IN THE

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

Second Appellate District

Division Three

Civ. No. B 005912

(Super. Ct. No. C420153)

Church of Scientology of California,

Plaintiff-Appellant,

and

Mary Sue Hubbard,

Intervenor-Plaintiff-Appellant,

--against--

Gerald Armstrong,

Defendant-Respondent.

On Appeal From Superior Court of the State of California

County of Los Angeles

Judge Paul G. Breckenridge, Jr.

RESPONDENT'S BRIEF

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INTRODUCTION

This appeal is from an extraordinary case whose judgment has correctly formulated the rights and liabilities of the parties. Contrary to the contention of Plaintiffs/Appellants (hereinafter "Plaintiffs," "Plaintiff Church," "Plaintiff Organization," or "Plaintiff Mary Sue Hubbard"), the judgment does not threaten basic constitutional and common law rules, but rather preserves and engenders them under the specific set of facts set forth, infra, under Statement of Facts.

Defendant/Respondent, Gerald Armstrong (hereinafter "Defendant"), was a highly dedicated and devoted member of the Church of Scientology, whose founder is L. Ron Hubbard.[1/] Plaintiffs claimed that Defendant, after resigning his position as Hubbard Archivist and Biography Researcher, converted several thousand pages of archive material to his own use and disseminated them to others. Although the trial court found Plaintiffs had established prima facie cases of conversion, breach of fiduciary duty, invasion of privacy and breach of confidence,[2/] Defendant's overwhelming evidence of justification and privilege in taking the action he did convinced the trial court to render a defense verdict and deny Plaintiffs' request for a permanent injunction because of their unclean hands. As will be shown, the actions taken by Plaintiffs against Defendant before and after Defendant took the archive material and delivered it to his attorneys were so bizarre as to defy the imagination.

Contrary to Plaintiffs' contention that the trial court transformed this case into a "heresy trial of Plaintiffs' religion," the court simply allowed evidence

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1/ Although the dispute in this case concerned documents allegedly owned by Mr. Hubbard, he was not a party to the action and did not appear at trial.

2/ The court specifically found Plaintiff Church had established conversion, breach of fiduciary duty and breach of confidence, and Plaintiff Mary Sue Hubbard had established conversion and invasion of privacy (See Appellants' Appendix 254-255, hereinafter "A-App").

relevant to the defenses of privilege, justification and unclean hands to be admitted. Because Plaintiffs are unhappy that the court heard evidence of the harassive tactics, covert operations, treatment of "enemies," use of "security checks" and a host of other malicious and bizarre actions taken against Defendant and defense witnesses, is no reason to reverse a sound judgment.

The trial court based its decision on weeks of trial testimony and hundreds of exhibits. If Plaintiffs are displeased with the court's opinion, then they are displeased with the overwhelming truth about their organization and how it treated Defendant when he sought to correct the falsehoods being spread on a daily basis to the public, to innocent Scientologists and to himself. Although Plaintiffs contend that they are victims of "intrusive and abusive" conduct by Defendant, it was the Defendant who was made a victim of such conduct at the hands of Plaintiffs. The only thing Defendant sought was truth. The only thing Plaintiffs sought was to hide the truth. In doing so, their reprehensible conduct toward this Defendant cost them equitable relief and damages. Their attempts to hide behind religion are misplaced. The trial court did not inquire into the truth or falsity of Plaintiffs' religious beliefs, and specifically so found in its Statement of Decision (A-App. 256-257). As Defendant will demonstrate herein, the judgment of the trial court is correct under the law and the evidence presented.

STATEMENT OF CASE

PROCEEDINGS BELOW:

The procedural history of the case as outlined by Plaintiffs is essentially correct. (Defendant, however, does not agree with statements made with respect to substantive matters.) Defendant briefly notes the following matters omitted by Plaintiffs regarding procedure.

Following the issuance of a temporary restraining order on August 24, 1982, Defendant's attorneys, Michael J.

Flynn and Contos & Bunch, delivered a total of five boxes of documents and materials to the Clerk of the Superior Court.

On September 24, 1982, when the temporary restraining order was converted into a preliminary injunction (A-App. 61), the court not only provided that the documents could be viewed by attorneys and parties involved in the case, but further provided that the documents could be used by third parties in other litigation upon a showing that the documents were relevant for discovery (A-App. 62-63).[3/]

Plaintiffs never sought extraordinary relief to stay that portion of the preliminary injunction allowing third party discovery of the documents.[4/] The only action taken by Plaintiffs was a motion for clarification of the preliminary injunction heard December 8, 1982. Based upon said motion, Superior Court Judge Cole issued an Order prepared by counsel for Plaintiff Church providing for a more detailed discovery plan with respect to the documents (Respondent's Appendix 1; hereinafter "R-App."). These are the very same documents over which Plaintiffs now make strenuous First Amendment and privacy claims.

With respect to Defendant's unclean hands defense, Defendant moved to amend his answer to include the same before the trial court (R-App. 4). Although the defense had previously been stricken, it had never been stricken without leave to amend.[5/] The reasons that the defense had previously been stricken were at first, the inclusion of extraneous material, and later, the omission of factual allegations (RT 312). However, during discovery the facts to support an unclean hands defense became abundantly clear. Additionally, Plaintiffs engaged in harassive tactics against

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3/ Several parties attempted to obtain discovery, but Plaintiffs used numerous roadblocks to prevent access.

4/ Defendant notes this in view of Plaintiffs' present claims that the documents are subject to strict privacy and religious protections.

5/ At A-App. 124, Plaintiff's Notice of Ruling erroneously so states. But see the Court's minute order at A-App. 127 where nothing is stated in that regard.

Defendant to obtain return of the documents when he no longer had them. Thus, Defendant moved to amend even though the trial court could have amended sua sponte upon hearing the evidence.

Lastly, with respect to the trial court's Statement of Decision, the conclusions therein were reached after five weeks of trial. During that time, the Court heard ample evidence to support its findings of fact and law, and further observed the demeanor and bearing of the witnesses. Simply because Plaintiffs are unhappy with otherwise accurate findings does not provide sufficient reason for reversal.

STATEMENT OF FACTS

A. DEFENDANT'S CASE.[6/]

1. Defendant's History With the Church of Scientology.

At the time Defendant originally joined the Sea Organization in 1971, he was primarily motivated by what he believed to be the remarkable achievements of L. Ron Hubbard (RT 1392, 1395).[7/] Defendant also believed that the promise

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6/ Plaintiffs' case consisted primarily of the reading of selected portions of Defendant's deposition into the record. The defense objected to this procedure since the testimony was presented out of context (RT 714). However, the trial court overruled the objection.

7/ Defendant read several publications and books (Exhs. N, O, P, Q, R, S, and T) in which Hubbard claimed to have traveled in Asia and studied with lama priests in China and India; claimed to be a nuclear physicist; to head expeditions to study savage peoples; to have done considerable movie work (RT 1397); to have commanded a squadron of Corvettes in World War II; to have been wounded and blinded in World War II; and to have healed himself through his science of the mind, Dianetics (RT 1398, 1399-1400); to have developed Dianetics and Scientology as sciences (RT 1398); to have been an atomic physicist and engineer, graduated from George Washington University (RT 1399) and Princeton University (RT 1402); to have twice been pronounced dead; to have been extensively decorated in World War II and to have fought in several theaters of the war (RT 1400) (See also RT 1402-1409). Defendant believed that by joining

of truth and honesty contained in Hubbard's writings was of utmost importance in forming the decision to become involved with Scientology (RT 1412, 1413).

However, almost from the beginning, Defendant discovered there were lies being told about Hubbard and his organization, which lies were approved by Hubbard. In 1971, Defendant began his work on Hubbard's ship, the Apollo. He was given a package of materials to review and was drilled on their contents (RT 1416). The materials concerned what was a "shore story" to be told to outsiders-that the crew and ship were part of a Panamanian business management corporation called "Operation and Transport Corporation Limited" (RT 1416). The shore story was used as a cover, so local authorities and people would not know the Apollo was part of the Church of Scientology (RT 1419).

Defendant was also drilled on how to deny that Hubbard received monies from the Church of Scientology and how to lie that Hubbard had resigned as director of Scientology in 1966 (RT 1424). He was further drilled to deny that Hubbard exercised ultimate supervisory authority on the Apollo (RT 1425), although he did (RT 1418).

Defendant was on the Apollo from February of 1971 through September of 1975 (RT 1423). During that time, and specifically in 1974, he became aware of Hubbard's creation of the "RPF" or Rehabilitation Project Force (RT 1432). The RPF was a Scientology prison used to punish members who exhibited antagonism or "counter-intention" to Hubbard (RT 1432). In the RPF the prisoners were forced to perform labor consisting of menial tasks for little or no pay under extreme and harsh conditions (RT 1432).[8/] While he was on the

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the Sea Organization he would be working for Hubbard, a hero, explorer, scientist, nuclear physicist, mathematician, and engineer (RT 1409).

8/ Defense witness Howard Schomer corroborated this testimony. He testified that he was assigned to the RPF on the ship, where conditions were unbearable - filthy berthing in a storage hold of the ship, cockroaches, floor mattresses, leftover food and denial of communication with crew members (RT 4488-4489).

Apollo, Defendant's predominant emotion was fear. (RT 1434-35).

In 1974 Defendant worked as the "intelligence officer" on the ship (RT 1440). He read a number of policies on how to deal with enemies of Scientology and Hubbard (RT 1440), including the Fair Game Doctrine (RT 1440; Exh. RR). That doctrine, written by Hubbard in 1967, provides that enemies of Scientology are "fair game" and "may be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued or lied to or destroyed." (Exh. RR).[9/] Defendant learned that an enemy of Scientology and Hubbard was someone critical of them (RT 1439).

In the fall of 1975, Defendant was moved to a location in Daytona Beach, Florida where he worked in the Intelligence Bureau of the Guardian's Office (RT 1444).[10/] Part of his duties included coding and decoding telexes and destruction of security materials (RT 1445). It was in 1975 while in the Guardian's Office that Defendant first learned of the "culling" of "P.C. files."

P.C. or pre-clear files (also called auditing files and processing files), are maintained for each Scientology member undergoing the process of auditing. The pre-clear

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9/ Other documents introduced by Defendant to show training for the handling of enemies included Exh. AAA, Guardian Order 121669 (RT 2047); Exh. BBB, Policy Letters on Black Propoganda (RT 2073); Exh. EEE, an enemies list or CIC X Mark Sheet (Combat Information Center cross-filing sheet) (RT 2695); Exh. HHH, Guardian Office Information (Intelligence) Full Hat (RT 2719); Exh. VVV, Re: Successful and Unsuccessful Actions (RT 2874); Exh. YYY, Intelligence Chief (RT 2964). Although Plaintiffs claimed that the Fair Game Doctrine had been cancelled, only the use of the term was cancelled because it caused "bad public relations"; the handling of enemies remained the same (Exh. AAAA).

10/ At RT 2730-2731, Defendant describes the Guardians Office as containing several bureaus, one of which was the intelligence bureau, which was the "enforcement" or "military" arm of Scientology. Plaintiff Mary Sue Hubbard was controller of the Guardians Office and had overall supervisory authority of its functions (RT 860; 2838-2839).

enters into an auditing session with his auditor wherein he divulges minute details of his present and past lives in response to questions posed by the auditor. During this process, the pre-clear holds two tin cans of an "E-meter," a crude lie detector machine. The auditor copiously takes down what the pre-clear says and maintains it in the P.C. file. Pre-clears are routinely told that this information is held in strict confidence, although in fact, it is used by the Guardian's Office for intelligence and control purposes (RT 2045).

Defendant saw correspondence concerning individuals who were regarded enemies of Scientology, containing information from their P.C. files while he was in the Guardian's Office.

In May of 1976, Defendant was sent to Culver City in Los Angeles to set up a new area for Hubbard (RT 1454). Hubbard and his wife, Plaintiff Mary Sue Hubbard, came to Culver City under cover and strict security (RT 1455). Soon after Hubbard's arrival, Defendant was ordered by him to be locked up for allegedly swearing (RT 1457). Defendant spent three weeks locked in a room with a guard at the door (RT 1457-1458). After approximately one week to ten days, he was taken out on a daily basis and driven to a UCLA library where he was ordered to do research on certain individuals labeled enemies by the Scientology Organization (RT 1460). Defendant's then wife, Terri Gamboa, was also ordered locked up for the last few days of Defendant's incarceration (RT 1460). They were then ordered to go to Clearwater, Florida by Hubbard (RT 1460).

When Defendant and his wife arrived in Clearwater, they were advised that Hubbard had ordered them into the RPF for an alleged charge of insubordination (RT 1461). Defendant spent the next seventeen months in the RPF until December 1, 1977 (RT 1461-62).[11/] During much of that time,

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11/ Other defense witnesses testified to similar experiences in the RPF. Laurel Sullivan was held under guard in the RPF in 1978 and 1981 (RT 3144-3146; 3026-3027; 3358-3359); Kima Douglas was ordered to the RPF by Hubbard when he became angered about his medical test results (RT 4438-4439).

Defendant worked 100 hours per week and earned $4.30 (RT 1463). He was also ordered to sign "Non-disclosure and Release Bonds" (RT 1465; Exh. U). Defendant understood that these documents allegedly obligated him to pay $10,000.00 to the Scientology Organization if he disclosed any information regarding Scientology, but he would have signed anything at the time (RT 1466). Additionally, while Defendant was in the RPF at this time, he was continuously ordered to "cull" individuals' "P.C." files for embarrassing facts. These facts or "crimes" would be used to discredit or blackmail an individual (RT 2045).12/

After serving his sentence in the RPF, Defendant was ordered to go to La Quinta, California where he arrived on December 30, 1977 (RT 1469). There were several "shore stories" used for outsiders, so that no one would know the property was under the control of Hubbard and his organization (RT 1470). While there, Defendant was involved in movie production with Hubbard. However, in September of

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12/ Defendant introduced a series of documents which showed that the Guardian's Office in fact used embarrassing or otherwise harmful information from pre-clear files although the files are supposedly sacred and confidential. See Exhs. JJJ, KKK, LLL, MMM, NNN and RRR. Additionally, Defendant introduced documents to show the Guardian's Office use of information gathered on people. See Exhs. OOO and PPP (which includes files on Edmond Brown, Edmond Brown, Jr., Tom Bradley and Ethel Bradley). All of these exhibits were placed under seal by the court although they were not part of the documents which Plaintiffs alleged Defendant converted.

Additionally, defense witnesses testified about their experiences culling P.C. files (E.g. Laurel Sullilvan at RT 3203-3204; Edward Walters at RT 4390, 4392-4395, 4411-4413; Kima Douglas at RT 4437-4439, 4460-4461; Nancy Dincalci at RT 3531-3532, 3553, 3566, 3568-3572). Even Lyman Spurlock, a current member of the Church of Scientology, acknowledged the process of culling P.C. files by the Guardian's Office (RT 3494) and considered it criminal by Scientology standards (RT 3521-3524). Mr. Spurlock was purportedly outraged and surprised when he discovered the process in 1981 or 1982 (RT 3494-3495), although defense witness Nancy Dincalci testified that she saw Mr. Spurlock culling P.C. files in 1977 (RT 3568-3569).

1978, Hubbard once again ordered Defendant to the RPF for allegedly joking about a film production (RT 1473). In 1978-79, while Defendant was in La Quinta and later, Gilman Hot Springs, California, he observed Hubbard's behavior to be irrational. Hubbard yelled, raged at people and swore a great deal. Defendant was always in fear of him (RT 2076). Hubbard would order people to the RPF for minor infractions and was abusive towards others (RT 2077).

Thus, Defendant spent eight months in the RPF until April of 1979 (RT 1473, 1475). During this time, Defendant was again ordered to cull individuals' pre-clear files (RT 2046). It was only after leaving the organization in December of 1981 that Defendant learned of a policy written by Plaintiff Mary Sue Hubbard in which the culling of pre-clear files was explained and sanctioned.13/

Also during Defendant's time in La Quinta in 1978, he was ordered to participate in "vetting" and shredding of documents which might show any connection Hubbard had to the Guardian's Office or his control of Scientology (RT 1484).

13/ This is the infamous Guardian Order 121669 (Exh. AAA) admittedly authored by Plaintiff Mary Sue Hubbard (RT 2792) which calls for the use of information from these files for the establishment of intelligence files on persons found to be "infiltrators, double agents, and disaffected staff members, Scientologists and relatives of Scientologists." Information would be used in "case of attack or for use in preventing any attack." Although Mrs. Hubbard denied that the term "processing files" in the Order meant pre-clear files (RT 2802), two pages of the "Dianetics and Scientology Technical Dictionary" introduced as Exh. WWW showed otherwise. At those pages is the definition of "processing" which clearly shows processing to mean auditing (See also RT 2877-2878). Further, upon being shown the series of exhibits (JJJ, KKK, LLL, MMM, NNN and RRR) which contained information taken from individuals' pre-clear files for intelligence purposes, Mrs. Hubbard's memory suddenly failed and she became evasive (RT 2804-2807; 2809-2813; 2819-2821). It was clearly established, though, that Mrs. Hubbard was controller of the Guardian's Office, responsible and accountable for all Guardian's Offices and their activities (RT 860; 2838-2839).

Vetting is a process used to excise portions of a document that could pose a security risk and was the subject of a written policy (RT 1485-87; Exh. W).[14/]

In addition to vetting and shredding of documents, Defendant was further ordered to undergo security checks (or "Sec Checks") (RT 1488). Sec Checks involved interrogation of a person through the use of an E-Meter, also known as a lie detector, to find criminal background, transgressions against the Hubbards and Scientology, and any other anti-Hubbard or Scientology conduct of which the person was suspected. (Exh. X; RT 1487-1489; 3501-3502) The Sec Check experience is vividly described by defense witness Howard Schomer. Mr. Schomer was dragged into a room and held there for ten hours, through the night, where he was intensely interrogated, spat upon with tobacco juice, threatened with criminal prosecution and generally terrorized (RT 4500-4505). He was thereafter locked up under guard until he escaped in total fear (R.T 4506-4508). Defendant was the subject of Sec Checking on hundreds of occasions (RT 1490).

In 1979, while still at Gilman Hot Springs, Defendant received a briefing on a potential government raid (RT 1490-91).[15/]

By this time, Defendant held the position of L. Ron Hubbard's Renovations-In-Charge and Hubbard's Household

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14/ Plaintiff Mary Sue Hubbard corroborated Defendant's testimony that the Guardian's Office was involved in vetting of documents (RT 881-882). However, she later contradicted her testimony saying that she had never heard of vetting (RT 2797).

15/ One government raid of Scientology headquarters in 1977 produced thousands of incriminating documents and eventually led to the prosecution and conviction of top Scientology members, including Plaintiff Mary Sue Hubbard (RT 882). At Gilman Hot Springs, there was a vetting and shredding project which included any documents connecting Hubbard to the Guardian's Office and to control of the Scientology Organization (RT 1491). An industrial shredder was rented and everyone on the property (in excess of 200 people) began vetting and shredding documents (RT 1491-1495; 3053-3055). Thousands of documents were shredded (RT 1600).

Unit In-Charge (RT 1477). It was during this mass vetting and shredding project that Defendant first came into contact with documents that would later comprise the Hubbard Archives and be used for the Hubbard biography. An individual by the name of Brenda Black brought a box of documents to Defendant and asked him if they were to be shredded (RT 1496). The box was found on the top floor of a condemned hotel on the property where personal materials of Hubbard were kept (RT 1496). Defendant decided not to shred the documents which included letters, materials regarding the death of Hubbard's son, Quentin, notes of Hubbard's trip to China and other documents (RT 1498-99).

Defendant knew of the project to do a biography of L. Ron Hubbard and thus took the documents to Laurel Sullivan, who worked on the property and held the post or position of Senior Personal Public Relations Officer to Mr. Hubbard. (RT 1498). Defendant felt that those documents and additional documents found over the next few days could be used to create the foundation for a biography (RT 1500-1501).

Thus, on January 8, 1980, Defendant sent a petition to Hubbard asking for permission to collect the documents on Hubbard and to do the research for his biography (RT 1502; Exh. F). A few days later, Defendant received a response from Hubbard approving his petition (RT 1509-1510; 4437; Exh. Y). He also received a second letter from Hubbard dated February 8, 1980 in which Hubbard reiterated his approval (RT 1511; Exh. 2). At the time, Defendant also sent correspondence to Plaintiff Mary Sue Hubbard advising her of his new post and requesting any information about herself which could be used in the biography (RT 1518-1527; Exh. E). Defendant received a response from Plaintiff Mary Sue Hubbard dated February 11, 1980 from which he understood that he was to contact Mrs. Hubbard's secretary for biographical information (RT 1527-1528; Exh. D).

Defendant continued with his duties as biography researcher and archivist, receiving a letter of introduction from the Personal Office of L. Ron Hubbard in July of 1980

(RT 1634-1536; Exh. BB).[16/] By October, 1980, Defendant had collected a couple of hundred thousand pages of documents for the Archives and biography (RT 1540).[17/] He was no longer located at Gilman Hot Springs, but had moved to a space in Hubbard's personal office in the Church of Scientology Cedars Complex in Los Angeles (RT 1533-1534). In order to explain the major sources from which Defendant received documents, a chart prepared by Defendant was admitted into evidence (Exh. CC). Defendant testified about each source and the types of documents he obtained from them (RT 1548-1563). The categories included technical materials (which were routed to the Controller Archives RT 1552), correspondence between Mr. Hubbard and his family, correspondence between Mr. Hubbard and friends, documents relating to the death of Mr. Hubbard's son, naval documents of Mr. Hubbard, documents of his companies which formed the Sea Organization--Hubbard Explorational Company, Operation and Transport Services, Operation and Transport Corp.--his horticulture activities,

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16/ He also corresponded with Plaintiff Mary Sue Hubbard again in October of 1980 at the request of Laurel Sullivan, to brief Mrs. Hubbard on his work (RT 1536-1540; 1543-1545; Exh. J). Further, Mrs. Hubbard was kept closely apprised of archive materials collected and the progress of the biography project in general by Laurel Sullivan (RT 3070; 3100-3101; 3106-3114). Mrs. Hubbard claimed, however, that the first time she had knowledge of Defendant's possession of personal materials relating to her and her husband was in the summer of 1982 (RT 871; 874). However, her testimony was contradictory on the subject of what she knew Defendant had in early 1980 (RT 875-878). Further, she claimed never to have given permission for Defendant to have personal papers although she approved a letter of February 5, 1980 from Defendant to her in which he states he had personal letters (RT 914; Exhs. E and D).

17/ By the time he left Scientology in December, 1981, Defendant had collected approximately five to six hundred thousand documents. The documents under seal with the court comprise approximately one to two percent of the overall collection (RT 1540-1541).

and of his activities in the early 1950's and while on the ship Apollo.[18/]

Defendant also conducted interviews of relatives, friends and acquaintances to obtain information (RT 1607).

In October, 1980, an agreement was entered into between biographer Omar V. Garrison and AOSH DK Publications[19/] for the writing of a biography of L. Ron Hubbard (Exh. G). Prior to that time, Defendant had participated in the contract negotiations and had met with Mr. Garrison (RT 1614). He provided Mr. Garrison with an inventory of the documents and understood that Mr. Garrison would not undertake the biography without use of the documents (RT 1617).[20/]

18/ Defendant testified that approximately 50 percent of the documents under seal came from the Del Sol source which was the Gilman Hot Springs location where Defendant first saw any materials (RT 1601). A major portion of that source contained Hubbard's naval records (RT 1562).

19/ Defense witness Laurel Sullivan testified that AOSH DK Publications was a for-profit corporation controlled by the Guardian's Office and ultimately L. Ron Hubbard (RT 3076-3077).

20/ Mr. Hubbard agreed to make his personal files and letters available to Mr. Garrison, including "personal letters, journals, diaries, photographs, etc." (Exh. EE.) He was also to pay a salary to all employees hired by him in connection with the biography (Exh. EE). Defendant understood he was to be paid by Hubbard (RT 1628), which was corroborated by Laurel Sullivan (RT 3084-3087). Further, the biography contract, par. 10(b), states that Mr. Garrison would be provided with a research assistant (Exh. G). In the face of this evidence, Plaintiff Mary Sue Hubbard testified that Mr. Hubbard never approved the contract (RT 907), never authorized Defendant to be on the biography project (RT 905) (Hubbard's personal medical officer, however, witnessed Hubbard's approval of Defendant's petition (RT 4437)), and never approved his petition (RT 911). However, in an affidavit filed by Plaintiff Mary Sue Hubbard in this case, signed January 28, 1983, Plaintiff states at par. 15 that Defendant assumed the post of Personal PRO (Public Relations Officer) Researcher after requesting the post from Mr. Hubbard and receiving approval (RT 911-912). Moreover, Mr. Garrison testified that Defendant was introduced to him as research assistant in charge of documents pertaining to Mr. Hubbard's life by David Gaiman, who at that time was directly under Mrs. Hubbard in rank (RT 1285, 1286).

Defendant and Mr. Garrison were in close communication from that time on through December, 1981 (RT 1635). It was Defendant's understanding that there were no restrictions as to the types of materials he could give to Mr. Garrison for preparation of the biography (RT 1637). He thus delivered copies of thousands of documents to Mr. Garrison (RT 1637).

From October, 1980 to December, 1981 Defendant had hundreds of conversations with Mr. Garrison regarding the project. They discovered and discussed discrepancies and contradictions between information contained in the documents and the public relations pieces written by and about Mr. Hubbard that Defendant had originally relied upon when he joined Scientology (RT 1640-43; 3602). In fact, Defendant and Mr. Garrison discussed the probability that they could be subjects of an attack for discovering the truth about Hubbard's past (RT 1644).

This particular discussion occurred in the fall of 1981 and preceded the first in a series of incidents which led Defendant to deliver the documents to his attorneys (RT 1645). The incident involved an order that Defendant be Sec Checked at Gilman Hot Springs to determine what material he had provided to Mr. Garrison (RT 16450), and to explain claims that Defendant was speaking out against Hubbard (RT 1655).[21/] Defendant reported to the ethics officer in the

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21/ This Sec Check followed Defendant's request that his then wife, Jocelyn, be allowed to join him in his work since she felt she had been forced to perform illegal tasks in the course of her work with Scientology Missions International (RT 1650-1652). Plaintiffs stated in their brief at p. 16 that the Sec Check ("non-confidential Church procedure") was ordered because Defendant's performance was unsatisfactory and he was hostile to Hubbard and the Organization. Plaintiffs further stated that Defendant "refused" the Sec Check. Plaintiffs provide no citation to the record to support these "facts," and Defendant submits there is no support. Moreover, Plaintiffs' witness, Vaughn Young, in writing to Defendant after he left, stated "you're the best damned whatever-we-researchers/archivists-types-are that I've met."

Commodore's Messenger Unit at Gilman Hot Springs, Cirrus Slevin, who was in charge of discipline and punishment (RT 1655). Defendant explained what he had done in providing documents to Mr. Garrison and further denied that he was speaking out against Hubbard (RT 1655). Defendant wrote a report summarizing the same (RT 1655-56; Exhibit II). The purpose of the report was to correct the claim that Defendant was attacking Hubbard by discovering truthful facts about his background and achievements (RT 1656-57; 1660-66). In the report written by Defendant to Cirrus, it is clear that Defendant's intentions were to help and not to attack Mr. Hubbard. This report is extremely important in that it shows Defendant was looking for truth and accuracy with respect to Hubbard's biography, and was completely open about his intentions and findings with members of the Church of Scientology. Unfortunately for Defendant, his naivete, his honesty and his continued belief that the Organization would work with him to correct the inaccuracies and falsehoods he had discovered led him directly into the path of a major attack against him.

Defendant viewed the Sec Checking order as an attack upon him. The individual who ordered it was unwilling to speak to him, and Defendant felt that the actions being taken were in line with the Guardian's Office harassment of individuals viewed as enemies (RT 1678-79). He began to slowly perceive that the real purpose of the Scientology Organization was nothing but an intelligence organization; he began to perceive the purpose of the Guardian's Office as the destruction of anyone who sought to discover the truth about L. Ron Hubbard (RT 1679). During the first nine years Defendant was in Scientology, he had excused the acts of Hubbard and the Organization in engaging in frauds and lies because he believed these actions were taken to counter attacks of enemies. Defendant had been led to believe that these enemies were out to destroy Hubbard and his reputation.

(Exh. OO.) Mr. Garrison also testified that Defendant had done an "extraordinary job" as researcher and archivist (RT 1205-1206; 3648; 3668).

During 1981, Defendant realized that attacks on enemies did not resolve any problems; that, in fact, there were no ememies. He saw the frauds and lies as a vehicle to provide Hubbard and his Organization wealth and power (RT 1689-1690).

Defendant and his wife became "extremely, extremely paranoid" by the Sec Checking action taken against Defendant and by reports of actions taken against others at the same time (RT 1679-1680).

Because of their fear, Defendant arranged for Mr. Garrison to telephone him at the Church premises if he did not hear from Defendant at agreed upon times (RT 1679-80; RT 3603). Defendant and his wife would turn up the volume of their radio in the room they shared at the Church so that no one would overhear them talking about their fears (RT 3675).22/

Within a week to ten days before Defendant and his wife left the Organization on December 12, 1981, they moved their possessions out of the Church premises, a box at a time, at all hours of the night (RT 1681). They did this because of their knowledge that the Organization locked up individuals trying to leave, forced them into security checks, forced them to sign lists of their "crimes" culled from P.C. folders and forced them to sign incriminating documents (RT 1681; 1683-84; 1686; 2907-2908). In fact, in the days before he left, Defendant was coincidentally told to sign a "Declaration of Religious Commitment and Application for Active Participation on Church Staff" (Exh. MM), through which he would release the Hubbards for any actions of the Church, agree never to file suit against them or their agents, and release them from all claims, etc. among other things (RT 1678-1688). He did not sign the document because

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22/ Defendant and his wife had been afraid even to speak to one another about their misgivings because of a policy of the Scientology Organization that husbands and wives write "knowledge reports" about one another to be submitted to Ethics (RT 3673-74). They both met with Mr. Garrison and told him of their fears. This meeting took place on the beach because they were in fear of being bugged or followed (RT 1681).

he felt certain representations contained therein regarding the Hubbards were false (RT 1688-1689).

Also before leaving the Organization, Defendant copied as many documents as possible for Mr. Garrison (RT 1682). He knew that Mr. Garrison was to have a completed manuscript by May, 1982 (RT 2283). Thus, from October, 1981 to December 12, 1981, Defendant provided Mr. Garrison with approximately 50,000 pages of material (RT 2284). Defendant was still dedicated to the project and wanted to be sure that Mr. Garrison received what he needed (RT 2286). He did not provide these documents to attack Hubbard or the Organization; he was solely interested in finding the truth (RT 2286-2287).[23/]

When Defendant left, he bore no hostility or ill will toward Mr. Hubbard; he had only wished to help Hubbard and the Organization (RT 2289). Defendant's state of mind was one of frustration and confusion (RT 3676), not hostility as Plaintiffs claim.

Defendant delivered all documents he had in his possession when he left the Organization directly to Mr. Garrison (RT 1682).

The night of their departure, Defendant and his wife stayed with Mr. Garrison, making sure they were not followed, leaving lights off and sleeping on the floor (RT 1682). From there, they drove to Canada, where Defendant's parents reside (RT 1682).

2. Events Following Defendant's Departure From Scientology.

23/ In their brief at p. 16, Plaintiffs claim that Defendant maintained his post to get the documents to Mr. Garrison where he would have access to them. The citations to the record (RT 1681, 2286) do not support this claim. In fact, Defendant testified to the contrary at RT 2286-2287, where he stated that he never thought about use of the documents until he was attacked in 1982. In fact, Defendant had nothing to do with the documents until March or April, 1982, when Mr. Garrison asked him to assist in the research on the biography again (RT 1747).

Shortly after leaving, Defendant was contacted by Vaughn Young, the individual who took over his position (RT 1692-1693). Defendant answered his questions regarding certain materials that Mr. Young could not locate for Mr. Garrison and went to the Church premises in January or February, 1982, to help locate the material (RT 1693-1696). Defendant was in fear but did not wish to antagonize the situation of his departure (RT 1696; 2575).

Because of his fear, Defendant made arrangements for his wife to wait outside the building until an appointed time. If he did not return by then, she would be alerted that something was wrong (RT 1697-98).

Thereafter, on February 18, 1982, a "Suppressive Person Declare" was issued by the Scientology Organization against Defendant (RT 1698; Exh. PP). A "suppressive person" is someone the Organization considers insane, evil, destructive and criminal (RT 1700). Based upon his twelve year experience with the Scientology Organization, the "declare" shocked Defendant since he realized that it was a "Black Propaganda" tool designed to allow the Organization to commit acts and operations against him and to turn the weight of the Organization against him (RT 1699-1700; Exh. BBB-Policy letters on Black Propaganda; RT 2072-2074). Defendant actually received the "declare" in April, 1982 (RT 1698). It accused him of secretly leaving the Organization and spreading destructive rumors about senior Scientologists (RT 1704; Exh. PP).

Defendant recognized this "declare" as a direct attack upon him by the Organization pursuant to the Fair Game Doctrine (RT 1704-1706; Exh. RR), which allows a "suppressive person" (S.P.) to "be deprived of property or injured by any means by any Scientologist without any discipline of the Scientology. May be tricked, sued or lied to or destroyed."[24/]

24/ Although Plaintiffs claimed at trial that the Fair Game Doctrine had been cancelled in 1969, in actuality, only

Defendant believed that this would now happen to him (RT 1705). His beliefs became a reality when photographs

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the use of the words "fair game" was cancelled. The policies on treatment and handling of suppressive persons were not cancelled (Exh. AAAA). At p. 17, fn. 16 of Plaintiffs' Brief, they contend (1) that at RT 3361-93 there is support for their theory of cancellation and (2) that their expert explained it was a religious doctrine. Regarding the first contention, the testimony of Laurel Sullivan at RT 3361 et seq. supports Defendant's contention that the implementation of Fair Game was never cancelled. Ms. Sullivan specifically states that there was no cancellation of the treatment and handling of suppressive persons (RT 3361) and that people declared enemies could be sued, lied to, deprived of property, cheated or destroyed (RT 3362-3363). She reiterated her testimony at RT 3393-3393. Defendant testified that "cancellation" of Fair Game was used for public relations purposes and that the doctrine was never cancelled (RT 2028; 2572). Ms. Sullivan was the subject of fair game (RT 3147; 3282; 3285-3286), and testified that a Suppressive Person Declare and a Fair Game Order are one and the same (RT 3291). She further stated that she had been contacted by an organization representative who indicated that if she cooperated with Plaintiffs with respect to trial, her declare would be cancelled (RT 3400-3402). Defense witness Edward Walters explained how the Guardian's Office use of the Fair Game Doctrine against enemies was standard, including destruction of a person's reputation or their business (RT 3583-3585). He further testified that the culling of PC files was standard fair game practice to obtain blackmailable information (RT 3585). Mr. Walters was willing to do whatever was necessary to protect Hubbard and Scientology against enemies (RT 4422). Even the writings of Mr. Hubbard, introduced into evidence as part of the sealed documents, show his infatuation with finding criminal activities of people's past to harass them (RT 2032-2044; Exhs. 500 DDDD-GGGG; 500 HHHHHH-NNNNNN).

Regarding Plaintiffs' religious expert, Frank K. Flinn, he admitted that fair game had not been cancelled, but modified (RT 4119); that he had not done a thorough investigation of the day to day practices of Scientology (RT 4109); that he had no first hand knowledge of abuses (RT 4102); that he had not interviewed victims of fair game (RT 4103); that he had seen none of the Guardian's Office documents seized by the FBI in 1977 regarding intelligence operations (RT 4105-4106); and that he did not know whether fair game was metaphysical or real (RT 4110). Mr. Flinn testified four to five times on behalf of Scientology and was paid a total of $10,000.00 (RT

entrusted to his care were "confiscated" based upon the "declare" issued against him (i.e., deprivation of property - RT 1710-1711).

Before having seen the "declare," Defendant made arrangements with a friend, Virgil Wilhite, to sell him three sets of photographs in which Hubbard was a subject (RT 1706-09). Two of the sets belonged to other people and one set belonged to Defendant (RT 1706-07; 4438; 3534). Defendant delivered all three sets to Mr. Wilhite around April 25 to 27, 1982 (RT 1710). Unbeknownst to Defendant, a second, revised Suppressive Person Declare had been issued against him on April 22, 1982. It charged him with 18 "Crimes and High Crimes and Suppressive Acts Against the Church" including theft, illegally taking or possessing Church property, reselling Organization materiel for personal gain, impersonating a Scientologist, falsifying reports, juggling accounts, obtaining loan or money under false pretenses, etc. (Exh. M). The "declare" further stated that Defendant was "promulgating false information about the Church, its Founder and members" through "the guise of 'documentation,'" that "altered documents" had been found in this area and that he was promoting LSD research (Id.).

When Defendant telephoned Mr. Wilhite a few days after delivery of the photographs to him, Mr. Wilhite said the deal was off because of the "declare" issued against Defendant (RT 1710). Mr. Wilhite had turned the photographs over to an individual from the Church, Lyman Spurlock, who represented himself as a Church attorney and presented the "declare" to Mr. Wilhite, claiming Defendant had stolen materials (RT 1710-11; 3678).[25/]

Defendant was extremely shaken and immediately drove to Mr. Wilhite's home with his wife, Mr. Garrison and

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4116). Thus, the evidence presented by Defendant that Plaintiffs continue to use fair game was persuasive, and very real to Defendant when he was declared.

25/ Mr. Spurlock is not, however, an attorney.

Mrs. Garrison (RT 1711). When Mr. Wilhite called Defendant a thief (RT 3679) and refused to return the photographs entrusted to Defendant's care, Defendant went to the CMO Building (Commodore's Messengers Organization).[26/] He was extremely afraid and angry and made repeated demands for return of the photographs (RT 1713-14).[27/] A heated, hysterical conversation ensued (RT 1322), during which Defendant was told that the photographs had been given to attorneys (RT 1713). At p. 18 of their Brief, Plaintiffs claim that they retained the photographs "on a bona fide claim of rightful possession." However, their own witness, Terri Gamboa, testified that she had destroyed the photographs, "chucked them out" (RT 4255) even though she believed they came from archives (RT 4267-4268).[28/]

Defendant was then ordered off the property by Ms. Gamboa and told to get an attorney (RT 1714).

This series of events confirmed the direct attack by the Organization against him; it confirmed his position as "enemy" and "suppressive person" subject to the Fair Game Doctrine by the deprivation of property and as a victim of lies and harassive litigation (RT 1714; 3679-3680).

26/ The CMO are Scientologists who are the personal attendants or emissaries of L. Ron Hubbard, also known as the Commodore (Exh. K) (RT 1713; 3679-3680; 1320-1324).

27/ Defendant testified he feared for his life (RT 2578). This testimony was corroborated by Mr. Garrison (RT 1317; 1320).

28/ This not only shows the utter disregard for supposedly private and valuable archival material, but the immediate response to destroy anything "unflattering" about Hubbard (RT 4268, where Ms. Gamboa testified the photos were not flattering). Further, Ms. Gamboa knew of the policy that archive material was not to be destroyed (RT 4274-4275) at the time she destroyed the photos (RT 4275). In direct contradiction to Ms. Gamboa, witness Howard Schomer testified that he saw the photographs in Ms. Gamboa's office after Defendant was in the CMO building demanding the same (RT 4491). He even identified one of the photographs (RT 4491; Exh. DDD).

On the night of the photograph incident, Defendant was terrified that he would be the target of a covert operation. He and his wife stayed up all night, unable to sleep (RT 1714; 3681), and Defendant began to keep a hunting knife by the bed (RT 1714; 3681). Defendant would be up at the slightest sound (RT 1714; 3681), and continued in this state of fear and terror for months (RT 1714-1715). Defendant's wife refused to remain alone (RT 1714-15; 3680-81).

Although Plaintiffs claim that the photo incident was the "single" incident that brought fear to Defendant, they fail to take into account Defendant's history with the Organization, his knowledge of their terrorist activities, his understanding of the Organization's paranoid behavior including Sec Checks, the RPF, intelligence activities, culling of P.C. files to blackmail people, use of black propaganda, fair game, and the harsh treatment of "enemies."[29/] Further, Defendant believed he was followed by private investigators in May, 1982, just after the photo incident (RT 1722). This was corroborated by testimony of Plaintiff Church attorney, John Peterson (RT 1158), and shows

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29/ As stated earlier, Defendant had been in the intelligence bureau of the Guardian's Office and was familiar with the "Information Full Hat" (Exh. HHH). A "hat" in Scientology terminology is a compilation of materials relating to the duties and responsibilities of a post, akin to a training pack or manual (RT 2718). Exh. HHH contains a number of policies and drills dealing with Black Propaganda (p. 10), covert operations (p. 9), theft (p. 9), counter-espionage (p. 8), enemies (p. 11), suppressives (p. 18), and G.O. 121669 (p. 20). At p. 10 of Exh. HHH, an intelligence "Drill" is ordered: "Write up a proposed covert operation using clandestine operations, plants, counter-espionage, agents, case officers, cut-outs, secret intelligence operations. Purely on an intelligence basis that would terminatedly handle (fill in name of target)."

that the usual harassment tactics were being implemented. In the same vein, Defendant's friends had been contacted in January and February, 1982 by an individual named Brad Ballantine, whom Defendant knew to be from the Intelligence Bureau of the Guardians Office (RT 2318). Mr. Ballantine attempted to obtain information about Defendant from these friends (RT 2318). Defendant's parents were also contacted (RT 2318).

Additionally, Defendant received the revised declare of April 22, 1982 at the end of May, 1982 (RT 1723; Exh. M).[30/] This was the first time he knew he was charged with wrongfully taking and altering documents (RT 1701; 1723).

Only after Plaintiff Organization directly attacked Defendant and created an atmosphere of terror did Defendant meet with Attorney Michael Flynn (RT 1723-1725). Defendant was well aware of Hubbard's and the Organization's policies to "attack the attacker," (Ex. 500MMMMMM) and to use the law to harass (RT 2070), and believed he would need a lawyer to defend himself. Indeed, Defendant was told by Plaintiff Organization's own agents to get a lawyer (RT 1714). Defendant retained Mr. Flynn because he knew that due to Plaintiff's abusive litigation tactics, few lawyers would get involved in litigation with it, and few lawyers had sufficient knowledge about the organization (RT 1757-1759).

Defendant's fear that he would be sued soon proved justified. On or about June 1, 1982, Defendant received a demand letter from John G. Peterson, Plaintiff Organization's attorney. In his letter, Mr. Peterson claimed Defendant had

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30/ Although Plaintiffs claim at p. 18, fn. 18 of their Brief that Defendant "changed his story" as to when he received the second revised declare, the claim is inaccurate. Defendant testified at RT 2386 that he learned of the declare in late May. At RT 1723 (where Plaintiffs contend Defendant cites an earlier date), Defendant testified that he received it "at the end of the month" referring to the month of May (R.t. 1722).

taken documents from Plaintiff Organization while he was in its employ and threatened Defendant with legal action. (Exh. 18) Defendant responded to this letter by informing Mr. Peterson that he had not taken any documents from Plaintiff Organization. (Exh. 19)

Although Defendant had not taken any documents from the Plaintiffs, he had, beginning in March or April 1982, received many documents from Omar Garrison. At that time, Mr. Garrison requested that Defendant again help with biography research. Mr. Garrison wanted Defendant to continue because he was not happy with Defendant's replacement, Vaughn Young, and because of Defendant's extraordinary recall of the archive materials. (RT 1748, 3668)
Mr. Garrison's relations with Plaintiff Organization had also become more strained in 1982, and irretrievably broke down in the spring when the organization accused Mr. Garrison of attempting to "blackmail" it. (RT 3609, 3888) Desiring to complete the biography, but fearful that the Guardian's Office might burglarize his home and steal the biography materials, Mr. Garrison asked Defendant to make a duplicate set of the most important documents. Defendant sequestered these copies in his own apartment, (RT 1748, 3607), which also doubled as an office for Mr. Garrison's small publishing company. At the same time Mr. Garrison also gave Defendant some original documents which he had not had a chance to sort. (RT 1749)

It was from these materials that Defendant chose most of the documents he sent to his lawyers. Defendant also obtained from Mr. Garrison, with his permission, other specific documents he estimated would be necessary for his defense, (RT 3620, 3636). Defendant gave his lawyers these documents only after he had been declared "Fair Game," after he received the April 22, 1982 "Declare," and after he had received Mr. Peterson's letter threatening suit.
Mr. Garrison authorized Defendant to send whatever materials were necessary to his lawyers. Mr. Garrison's only

restriction was that the documents not be given to another writer (RT 1768, 3621, 3653).

Between June and and August 1982, Defendant sent documents to his attorney (RT 1224, 1757). He sent the documents in order to defend himself against the threatened legal attack; to prove the falsity of the "Declare" issued against him and to seek advice on what his rights and legal defenses were (RT 1800). Not only did Defendant believe the documents would be relevant to his defenses, but he also believed they would have evidentiary value in any cross-complaint for fraud and intentional infliction of emotional distress he would have against Hubbard and Plaintiff Organization (RT 1806-2070).

The documents are plainly relevant to the purposes for which Defendant sought to use them, particularly regarding the deliberate falsity of the representations Hubbard and Plaintiff Organization made to Defendant in order to have him join Scientology. The documents show that Hubbard and Plaintiff Organization lied about Hubbard's war record and his claim that he had cured his war injuries through Dianetics (RT 1843; Ex. 500T; Ex. 500BB-500GGGG); that Hubbard and Plaintiff Organization lied about Hubbard's academic credentials (RT 1879; Ex. 500MMM); that Hubbard and Plaintiff Organization lied about Hubbard being a nuclear physicist (RT 1879; Ex. 500MMM); that Hubbard and Plaintiff Organization lied about Hubbard's control over the organization, and prove, in fact, that Hubbard still controls the organization (RT 1984; Exhs. 500AAAAA-500BBBBB; 500EEEEE-500FFFFF) and that Hubbard and Plaintiff Organization and lied about the millions of dollars Hubbard had received from the Organization (RT 2004; Exh. 500XXXXX-500AAAAAA). Further, the documents evidence Hubbard's opportunism, greed and vindictiveness (RT 2004, 2052, 1979). They also prove that Hubbard was responsible for attacks on Scientology critics, ordering critics' "crimes" and "unsavory pasts" found and then used to discredit and ruin them (RT 2032-2054, Exhs. 500EEEEEE-500SSSSSS).

Defendant faced physical as well as legal danger from the Plaintiffs. In August, 1982, private investigators admittedly working for Plaintiff Organization were constantly surveilling Defendant (RT 1726-27). This surveillance deteriorated into open and flagrant harassment. One investigator assaulted Defendant (RT 1728). Another swerved his car into Defendant, striking his elbow (RT 1731). The same individual on another occasion played dangerous games on the freeway while harassing Defendant, and attempted to push Defendant's vehicle off the highway (RT 1731, 1732). Defendant and his wife could not go anywhere or do anything without being watched or harassed; they were terrorized (RT 3685).

B. "FACTS" IMPROPERLY CITED TO THE COURT BY PLAINTIFFS.

Plaintiffs have improperly included in their Brief and Appendix references to matters which are not part of the record and in fact postdate the proceedings below. Pursuant to Caifornia Rules of Appellate Procedure the following sections of Appellants' Brief must be stricken:

1. Footnote 11 on page 12
2. Footnote 14 on page 15
3. The phrase "including Homer Schomer, who later admitted that a significant portion of his testimony was false" on page 21
4. Footnote 70 on page 97.

The only record reference for these sections is the Declaration of John G. Peterson (A-App. 294-307), which must also be stricken for the same reasons. The Peterson Declaration is dated April 17, 1985, eight months after judgment was entered in this case and ten months after trial was concluded. The events the declaration refers to also occurred after these proceedings were concluded below. The trial testimony quoted from Christofferson v. Church of Scientology, Mission of Davis No. A 7704-05184, (Or. Super. Ct., Multnomah County) was given in March and April 1985.

Peterson admits the surreptitious videotaping of Defendant Gerald Armstrong took place in November 1984 and the Declaration of Laurel Sullivan that Peterson cites (which was apparently filed in another unrelated case) is dated August 20, 1984. None of this material belongs in an appeal of a matter in which judgment was entered on August 10, 1984 and trial concluded on June 8, 1984.

Defendant must also note in addition to being improperly before the Court, the above-referenced material is blatantly misleading. If it were proper, Defendant could and would conclusively rebut every allegation contained in the Peterson declaration.

The Court, however, may obtain an inkling of how Plaintiffs have distorted events by examining an incident which did occur before the trial court. Appellants attempt at page 15, footnote 14 and page 21 of their Brief to discredit the entire testimony of defense witness Howard Schomer by claimng that he perjured himself and attempted to extort the Church of Scientology. The alleged perjury regarded documents Mr. Schomer hinted he might have in a safe deposit box (RT 4538). In fact, Mr. Schomer made such an inference because he feared for his life and felt he would be protected by stating that he had documents (RT 4558). When defense counsel was thereafter advised by Mr. Schomer that there were no documents, he immediately offered to recall Mr. Schomer to the stand to correct any misimpressions (RT 4548). Plaintiffs' trial counsel, however, then volunteered to withdraw the question and strike the ambiguous answer (RT 4549). Thus, due to Plaintiffs' action the "significant portion" of Mr. Schomer's testimony which Plaintiffs allege to be "false" is not even part of this record, and was promptly brought to the Court's attention by the Defendant! (Notwithstanding this incident, the trial court specifically found Mr. Schomer's testimony to be "credible" and "extremely persuasive" [A-App. 257]).

This Court's rules prohibiting reference to events and incidents which were not entered in evidence at trial is

designed to prevent the type of unproven and irresponsible allegations contained in the Peterson declaration and the Appellants' Brief. Plaintiffs blatant violation of this fundamental rule requires the striking of the offensive material.

ARGUMENT

I

ESTABLISHMENT OF A PRIMA FACIE CASE OF INVASION OF PRIVACY DOES NOT PRECLUDE THE ASSERTION OF VALID DEFENSES

Although the trial court found that Plaintiff Mary Sue Hubbard had established a prima facie case of invasion of privacy (A-App. 254-255), this finding did not automatically confer a victory upon Plaintiff. Pursuant to the case law, as will be demonstrated infra, Defendant was entitled to present his defenses. Based upon that presentation and the lack of credibility on the part of Plaintiff Mary Sue Hubbard and Plaintiff's witnesses, the trial court found the defenses presented to be valid and persuasive.

Plaintiff argues that Defendant's "unauthorized assumption of control over such deeply private documents would unquestionably violate the expectations--and offend the sensibilities--of the ordinary, reasonable man." (App. Brief, p. 29). What Plaintiff asserts is that an intrusion into "private documents"[31/] necessarily violates sensibilities in every case. That clearly is not the law.

First, the trial court did not find that Defendant had assumed control of the documents without authority. The

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31/ Although Plaintiffs claim that Defendant admitted the documents are private, he testified that only one document was particularly private (RT 1717). More importantly, Plaintiff Mary Sue Hubbard testified that she had been "mentally raped" by the invasion into her privacy, but on cross-examination she did not recognize a number of documents (RT 940-943); and she admitted that "it was not so much the content" of certain "personal letters" that was private, but the taking without authorization (RT 944-945) (there was ample evidence to show, however, that Defendant had authorization; and the trial court so found). Plaintiff Mary Sue Hubbard did not even know that other individuals, supposedly authorized by the Church, had read the documents (RT 948).

trial court found that Defendant "had permission and authority from Plaintiffs and L. Ron Hubbard to provide Omar Garrison with every document or object that was made available to Mr. Garrison, and further, had permission from Omar Garrison to take and deliver to his attorneys the documents and materials which were subsequently delivered to them . . ." (A-App. 254). Thus, contrary to the assertion of Plaintiffs, the facts of this case, as found by the trial court did not encompass unauthorized control. The trial court found only that Defendant ultimately used the documents for a purpose other than for the writing of an authorized biography of L. Ron Hubbard. He turned the documents over to his attorneys to protect them from destruction and to protect himself from physical harm at the hands of Plaintiffs (A-App. 255).

Second, the cases cited by Plaintiffs for the proposition that "courts have affirmed the peculiarly private nature of personal documents" (App. Brief, p. 29), are not applicable to the case at bar.

Two of those cases, Boyd v. United States, 116 U.S. 616 (1886) and Fisher v. United States, 425 U.S. 391 (1976), address the constitutional limitations on the governmental power to obtain an individual's private papers under the Fourth and Fifth Amendments to the Constitution. At issue in Boyd, was the possible "compulsory self-incrimination of an individual through governmental acquisition of private papers" as constituting "an unreasonable search and seizure prohibited by the fourth amendment." McKenna, The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment, 53 Indiana Law Journal 55, 58 (1977-78).

The ultimate concern in those cases is that the seizure of evidence by the government would compel an individual to be a witness against himself. The case at bar involved no issue of self-incrimination by admission of the subject documents and materials into evidence.

Moreover, more recent cases, including Fisher, supra, have significantly narrowed the private papers doctrine of Boyd. In Fisher, the Court upheld a governmental subpoena directing a taxpayer to produce accountants' workpapers and other tax records, suggesting in dictum that the Fifth Amendment no longer protects private papers. Id. at 409-13.

In Andersen v. Maryland, 427 U.S. 463 (1976) the Court held that the seizure of documents from the Defendant's offices and their admission into evidence did not violate the Fifth Amendment because the required compulsion was not present in a situation involving search and seizure. Id. at 473.

> "Until recently, it had been firmly established that the fifth amendment privilege may excuse an individual from compliance with a subpoena directing him to produce personal papers. With the decision in Fisher v. United States, however, the analytical basis of the principle has been severely, if not totally, undermined, to the point where it may no longer be viable." 53 Indiana Law Journal 55, 62.

Plaintiffs further cite the case of Nixon v. Administrator of General Services, 433 U.S. 425 (1976) to support their contention that private communications are subject to a legitimate expectation of privacy. In Nixon, the Court rejected the former President's claim that an Act of Congress directing the General Services Administrator to take custody of Nixon's tapes and papers violated Nixon's constitutional right of privacy. The Court concluded that although Nixon had a legitimate expectation of privacy in the documents, protective provisions of the Act and an overriding public interest in the documents militated against holding the Act unconstitutional.

Although all of the above-mentioned cases do recognize the right to nondisclosure of personal matter, they

also recognize that the right must be balanced against the interest of the state and of the public. Thus, simply because Plaintiffs assert a privacy interest in the subject documents will not, ipso facto, make an invasion of that alleged privacy interest offensive to a reasonable person. The circumstances of each case must be viewed separately.

II

PLAINTIFFS' POSITION THAT THE TRIAL COURT ERRED IN ALLOWING DEFENDANT TO PRESENT EVIDENCE TO JUSTIFY HIS CONDUCT IS NOT WELL TAKEN

Plaintiffs argue that the trial court erroneously interpreted the word "unreasonable" as used in the Restatement of Torts, Second, Sections 652A and 652B, to be measured by a balancing of interests. Plaintiffs contend that the word "unreasonable" is to be determined only from the point of view of the victim of the intrusion, and not from the point of view of the intruder as well. Plaintiffs' contention is not, however, supported by the case law or the Restatement.

Both Sections 652A and 652B incorporate reasonableness as the appropriate standard of conduct by which to measure an invasion of privacy. Section 652A, which sets out the general perimeters of the right to privacy, provides as follows:

> "(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right to privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another, as stated in section 652B. . . ."

Section 652B, which sets out one of the four specific types of invasion of privacy (intrusion), provides that:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[32/]

The Plaintiffs' brief cites Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), Emerson v. J.F. Shea Co., 76 Cal. App. 3d 579, 143 Cal. Rptr. 170 (1978) and Nobel v. Sears, Roebuck and Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1979) for the following propositions:

> 1. The reasonableness standard refers only to whether the intrusion on privacy would be offensive to a reasonable person, referring only to the reasonable sensibilities of the victim;
>
> 2. Courts have rejected motive (self defense or anticipated litigation) as a legal justification for intrusion; and
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> 3. Intrusion is never justified by private or public interests that motivate the intruder (App. Brief, p. 35).

32/ It should be noted that there appears to be tension in the standard of reasonableness embodied in Sections 652A and 652B. Section 652A focuses on whether the intrusion itself was unreasonable and Section 652B focuses on whether the intrusion was highly offensive to a reasonable person. Although no case has been found that rationalizes the tension between the language of Sections 652A and 652B, courts have undertaken a two-step approach to reasonableness. Tureen v. Equifax, Inc., 571 F.2d 411 (9th Cir. 1978), discussed infra.

First, neither Dietemann, Noble nor Emerson rely upon, or even cite, the Restatement. So the Plaintiffs' citations on page 38 of their Brief that these courts have construed Section 652B's reasonableness standard with an eye toward the victim is misleading. Second, Emerson turned on whether certain conduct constituted an invasion of privacy for which punitive damages could be recovered. Third, Dietemann rejected the First Amendment as a blanket grant of immunity for torts of invasion of privacy. Fourth, Noble involved the limited issue on an appeal from the sustaining of a demurrer that the Plaintiff had stated a cause of action for intrusion, without discussing the matter in depth. These decisions are factually and conceptually inapposite.

The most recent of the three decisions, Emerson, relied not upon the Restatement, but upon the 1972 amendment to the California Constitution.[33/] In Emerson the court expressly held that the new Constitutional provision did not "prohibit all incursions into individual privacy but rather that any such intervention must be justified by a compelling interest." Emerson, 143 Cal. Rptr. at 177. This conclusion alone undermines Plaintiffs' sweeping assertions that motive or interest can never be a justification.

Citing Dietemann, Plaintiffs argue that the privilege concepts of publication cases (i.e., invasion of privacy actions where publication is an essential element) are inapplicable to intrusion cases; thus there is no privilege defense against an intrusion action. (App. Brief at p. 40). Dietemann does not stand for such a broad proposition. Concededly, Dietemann held that publication is not an essential element of an intrusion claim. Id. at

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33/ The California Constitution, Article I, Section I, provides that "[a]ll people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

249.[34/] However, simply because the privileged communication defense (e.g., fair comment privilege or judicial proceedings) is inapplicable to intrusion cases, it does not necessarily follow that there are no privileges or defenses to an intrusion claim. It only means that the proposition that privilege concepts of privacy actions in which publication is an essential element does not apply to intrusion actions. Dietemann, 449 F.2d at 249-50. This is so only because publication is not an essential element in an intrusion action and applies (only) to the extent that the asserted privilege is a defense to the publication element of the privacy claim. In short, Dietemann can be properly read to leave room for a justification defense in an intrusion upon seclusion case.

A. The Reasonableness Standard Is Not Limited To The Sensibilities Of The Victim.

1. Courts Have Used A Balancing Of Intersts Test To Determine The Reasonableness Of The Intruder's Conduct.

In Tureen v. Equifaz, Inc., 571 F.2d 411 (8th Cir. 1978), the court used a two-step approach in addressing the issue of reasonableness in an intrusion action. The first step, an objective standard, addresses the substantial nature of the intrusion: was the intrusion conduct to which a reasonable man would strongly object? (See Section 652B, comment d.)

34/ The Dietemann case raised conflicting demands on the First Amendment and the right to privacy--issues of no concern in this case. Resolving that conflict, the court simply ruled that the First Amendment was not an absolute defense to an intrusion action. Id. at 250. The court cited and adopted Professor Nimmer's view that an intrusion, unlike a privacy action involving publication, does not involve speech or other expression. Id. See also Nimmer, The Right to Speak From Time to Time: First Amendment Theories Applied to Libel and Misapplied to Privacy. 56 Calif. L. Rev. 935, 957 (1968).

The second step turns on the reasonableness of the defendant's conduct, which involves a balancing of the victim's rights to privacy against the compelling nature of the defendant's excuse or justification.

Tureen involved an intrusion action against an independent consumer credit reporting firm for its investigation and report about the plaintiff made at the request of the plaintiff's insurance carrier. The court first determined that there was no substantial intrusion upon plaintiff's seclusion (no "evidence of objectionable snooping" by defendant to which a reasonable man would object). Id. at 416.

However, the court recognized that even if "objectionable snooping" was absent, intrusion could arise from collection and retention of information regarding plaintiff's past insurance history.

The court then balanced the legitimate business purpose for collecting and retaining credit information and issuing consumer reports, against the plaintiff's right to privacy, finding that as a matter of law there was no invasion of privacy. Id at 416.

In the present case, the trial court went through an analysis similar to that in Tureen. The court found that there was no substantial intrusion upon Plaintiff Mary Sue Hubbard's privacy, stating that the "invasion was slight." (A-App. 261) This finding was based upon the following facts: that Defendant had "permission to utilize these documents"; that only a few people had actually seen some of the documents; and that Plaintiff Mary Sue Hubbard did not appear to be distressed by Defendant showing some of the documents to these few people. (A-App. 260.)35/

35/ Further, as noted above, Plaintiff Mary Sue Hubbard, when shown the documents, was unable to identify some of them, admitted that the taking of others did not "mentally rape" her, and admitted that it was not the content of "personal letters" which was private, but the "unauthorized" taking that distresssed her. Mrs. Hubbard submitted no medical or psychiatric bills

Pursuant to Section 652B, the intrusion into a plaintiff's seclusion must be substantial to be actionable. In interpreting the meaning of "substantial," courts have often compared the degree of distress which must be suffered to that necessary to a cause of action for intentional infliction of emotional distress.

> "Invasion of privacy resulting in an intrusion of the plaintiff's seclusion or solitude or into his private affairs is similar to the tort of intentional infliction of emotional distress or suffering, and the anxiety suffered by the plaintiff in either case must be more severe than merely hurt feelings." 62 American Jurisprudence, Privacy, section 14 (2d Edition 1972).

Courts have also required the defendant's conduct to meet the same test, i.e. extreme and outrageous conduct beyond all bounds of decency.

In Mark v. King Broadcasting Co., 96 Wash. 2d 473, 635 P.2d 1081 (1981), plaintiff claimed intrusion where defendant filmed defendant in his pharmacy from outside the building in conjunction with a legitimate news story. The Supreme Court of Washington, recognizing intrusion as an invasion of privacy and citing to Sections 652A and 652B, found that the intrusion must be substantial. Id. at 635 P.2d 1094.

The Mark case involved a "minimal" intrusion in that the film showed the plaintiff for only 13 seconds, did not place plaintiff in any embarrasing position, did not show his facial features clearly, and was shot from a place

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for treatment of emotional distress and, in fact, did not see a psychiatrist (RT 962). The issue of Mrs. Hubbard's claims that Defendant was "unauthorized" is addressed in the Statement of Facts. As was established at trial, Mrs. Hubbard's testimony on that issue was confused and contradictory to prior testimony given under oath.

equally open to the public (although plaintiff testified that the property was private). Id. at 635 P.2d 1095. (See also, McLain v. Boise Cascade Corp., 271 Or. 549, 533 P.2d 343 (1975) no intrustion where private investigator, whom defendant hired to investigate plaintiff's suspected fraudulent workers compensation claims, trespassed on plaintiff's land to film him.)

In Shorter v. Retail Credit Company, 251 F. Supp. 329 (D.S.C. 1966), plaintiff sued for intrusion where the agent of retail credit company obtained personal information regarding plaintiffs from plaintiffs themselves. The court noted that in order to maintain an action for intrusion, plaintiffs would have to show "a blatant and shocking disregard 'of their rights by defendant,' and 'serious mental or physical injury'" to themselves. Id. at 332. Because plaintiffs failed to bring forth such evidence, there was no intrusion found.

Importantly, in coming to its conclusion, the Shorter court, citing the case of Meetze v. Associated Press, 230 S.C. 330, 95 S.E. 2d 606 (1956), stated that "the qualified 'right to be left alone' must be weighed against the conflicting interests of the other party involved." Id. at 332.

In recognizing this balancing test, the court found defendant to have acted in "good faith towards a legitimate goal, and not for the sole purpose of harassing the plaintiffs." Id. (See also Rycroft v. Gaddy, 314 S.E. 2d 39 (S.C. App. 1984) (citing Shorter); Nagz v. Bell Telephone Co. of Pennsylvania, 436 A. 2d 701 (Pa. Super. 1981) (no intrusion where telephone company's act in revealing plaintiff's long distance telephone numbers to ex-husband did not amount to outrageous conduct).

From the foregoing cases, it is clear that the Plaintiff must not only have shown to the satisfaction of the trier of fact that she suffered severe emotional distress, but that the Defendant's conduct was extreme and outrageous, beyond all bounds of decency.

The trial court in the case at bar found the intrusion to be "slight" for the reasons enumerated, supra, and further found the "reasons and justification for the Defendant's conduct manifest." (A-App. 261.) Based upon the evidence presented, the court was convinced that the question of whether the intrusion was highly offensive to a reasonable person should be answered in the negative.

In going on to the second step of its analysis, the trial court scrutinized the justification for the invasion:

> "The Restatement of Torts, Second, Section 652a, as well as case law, make it clear that not all invasions of privacy are unlawful or tortious. It is only when the invasion is unreasonable that it becomes actionable. Hence the trier of fact must engage in a balancing test, weighing the nature and extent of the invasion, as against the purported justification therefore to determine whether in a given case, the particular invasion or intrusion was unreasonable." (A-App. 256).

Thus, after finding that the intrusion into Plaintiff Mary Sue Hubbard's privacy was "slight" the court found the following facts justified Defendant's conduct: that he was declared an enemy of the Church and told to hire an attorney; that as a result of this action, Defendant reasonably believed he was a subject of "fair game"; that the only way he could defend himself and his integrity against charges of theft, slander and altering documents (among other things) was to obtain the documents necessary for his defense and place them with "a safe harbor," his attorney; that Defendant was terrified and undergoing severe emotional turmoil; and that Defendant did not unreasonably intrude simply by making his knowledge that of his attorney (A-App. 261).[36/]

36/ The court further noted that it was "ironic" that Plaintiff Mary Sue Hubbard should complain of an

As already shown by the Tureen and Emerson cases, courts may look to the reasonableness of an intruder's conduct to determine if an invasion of privacy is justified. The meaning of reasonableness hinges on the facts of the particular case. Norris v. Moskin Stores, Inc., 132 So.2d 321, 323 (1961).

This case is clearly unique. However, the evidence supporting Defendant's conduct in taking the documents and delivering them to his attorneys was so substantial and compelling, that the court found it to be justified. Although Plaintiffs claimed to be victims in this case, after all the evidence had been presented, it was Defendant who was the victim, forced to defend against baseless charges, threats, surveillance and the machinery of an Organization whose written policies call for the destruction of its perceived enemies. The trial court balanced the interests of Defendant in obtaining the documents and sending them to his attorneys against the interests of Plaintiffs in the documents, finding Defendant's reasons and justification manifest.

Other courts have also used a balancing of interests test in intrusion actions.

In the case of Norris v. Moskin Stores, Inc., supra, an intrusion action was brought by a debtor against a creditor in which the creditor engaged in "vicious" conduct against the debtor to collect a debt. The court emphasized that for an intrusion action to lie, the creditor would have to have deliberately initiated a systematic campaign of harassment against the debtor, not justified as a legitimate effort to collect a debt. The court stated:

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invasion of privacy as she was the author of "G.O. 121669" which called for the use of supposedly confidential information from Scientologists "sacred" pre-clear files by the GO Intelligence network (A-App. 261-262).

> "The problem of defining the scope of the right of privacy in the debtor-creditor situation is the problem of balancing the interest of the creditor in collecting his debt against that of the debtor in his own personality." Id. at 323.

The Court went on the find that in balancing the interests, it had to consider the reasonableness of the creditor's action. What constituted "reasonableness" would depend on the facts of each particular case. Id. at 323. The court also noted that the right of privacy is not absolute but is qualified by the rights of others. Id. at 324.

Similarly, in Schmukler v. Ohio-Bell Telephone Co., 116 N.E. 2d 819 (1953), plaintiff filed an action for intrusion after discovery that the telephone company was monitoring plaintiff's calls by listening in. At the time, the telephone company had reasonable grounds to believe plaintiff was unlawfully using her residential phone for business purposes. The monitoring of plaintiff's line proved this to be true.

In discussing the right of privacy, the Court noted that the right is not absolute, and requires that "in every case" the court resolve the conflict between the rights of the individual and the interests of society. Id. at 823.

Reviewing the acts of the telephone company, the court found that the company, being morally and justifiably convinced that plaintiff's line was used for business purposes, pursued the only method available--monitoring the telephone. The invasion could be characterized as slight, occurring in a closed room for a short period of time on each call.

Although plaintiff's counsel argued that plaintiff's unethical conduct provided no justification for the defendant's intrusion, the court disagreed:

> ". . . every right has its correlative duty. The plaintiff had the right to use her telephones in the manner agreed upon and as provided by law. The defendant in the instant case then had the right and duty to see to it that she used them in just that way." Id. at 826.

In looking at the "reasonableness" of the defendant's conduct, the court concluded that both the public interest and the defendant's interest required manual monitoring of plaintiff's telephone. Id. See also, Dowd v. Calabrese, 589 F. Supp. 1206, 1224-25 (D.C. 1984) (looking to reasonableness of investigative activities the court ruled that "only unreasonable intrusions upon seclusion are actionable." Spencer v. General Telephone Company of Pennsylvania, 551 F. Supp. 896, 899 (M.D. Pa. 1982) ("the actions of [the alleged intruder] as developed in the record are reasonable as a matter of law"); Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 828 (D.C. 1955) ("public interest must be balanced against the individual's rights").

Apart from the common law intrusion cases, a line of California case law has recognized a balance of interests standard for cases involving privacy protections under Article I, Section I of the California Constitution.[37/] Plaintiffs contend that in this case the facts as found by the trial court would support a finding of invasion of privacy under the California Constitution as well as under the common law.

All of those cases interpreting the constitutional provision with respect to privacy have used a balancing test. The seminal case in this area, White v. Davis, 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975), enunciated the rule that "the amendment does not purport to prohibit all incursion into individual privacy but rather that any such

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37/ See footnote 33/, supra.

intervention must be justified by a compelling interest." Id. at 775. Application of the rule involves a "balancing of interests." Emerson v. J. F. Shea Co., Inc., 76 Cal. App. 3d 579, 593, 143 Cal. Rptr. 170, 178 (1978). See also, Porter v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (University could contest plaintiff's allegations of invasion of privacy by showing compelling public interest justifying transmittal of transcripts); Loder v. Municipal Court, 17 Cal. 3d 859, 132 Cal. Rptr. 464, 553 P.2d 624 (1976) (use of arrest records justified by compelling interest of protecting public from recidivist offenders).

Thus, even under the approach taken in interpreting the right of privacy under the California Constitution, a balance of interests is undertaken by the courts. This is true because, as the California Supreme Court recognized in White, supra, the right of privacy does not prohibit all incursion into individual privacy.

B. The Interests Of Defendant In This Case Were Not Limited To Obtaining Evidence For Defense Of A Lawsuit.

Plaintiffs cite to two illustrations to comment b of Section 652B as support for their contention that justification for an intrusion cannot stem from the need to obtain evidence for defense of a lawsuit.

First, based upon the trial court's findings, the reasons and justification for Defendant's conduct were not limited to the need to obtain evidence to defend himself. Second, the illustrations do not involve intruders seeking evidence to defend themselves, but rather involve intruders who have taken affirmative action to obtain evidence necessary to initiate litigation. Unlike the case at bar, the intruders in those illustrations have not been threatened, harassed, accused of theft, falsification of documents and slander, have not been intimidated, declared enemies or "fair game" subject to cheating, lying, litigation

and destruction. The case law is clear that the reasonableness of the intruder's conduct must be judged on the facts of each case. Citing to the illustrations does nothing to advance Plaintiffs' argument.

Third, although the illustrations depict factual scenarios involving intruders seeking evidence, they are only illustrative examples of what constitutes intrusive-type conduct. These illustrations simply expand on what kind of intrusion is actionable. See Spencer v. General Telephone Co. of Pennsylvania, 551 F. Supp. 896 (M.D. Pa. 1982); Souder v. Pendleton Detectives, 88 So. 2d 716 (La. App. 1956).

Nowhere in the Restatement is it suggested that those illustrations are intended to show that evidence gathering is insufficient justification to warrant an invasion of privacy. The logical answer is that, in formulating illustrative examples, the restaters did not consider what intrusive actions may be justified by a compelling interest of the intruder. At any rate, illustrations 2 and 4 amount to no more than makeweights in the analysis of what, under the Emerson reasoning, constitutes a sufficient compelling interest.

The cases cited by Plaintiffs are also inapposite. In Froelich v. Adair, 516 P.2d 993 (Kan. 1983), for example, the plaintiff alleged that his privacy was violated when the defendant, in an attempt to protect herself from a defamation action by her former husband, procured someone to obtain hair samples from the plaintiff to support her statement that the plaintiff was her husband's homosexual lover. While the plaintiff was in the hospital, an investigator paid an orderly to obtain hair samples from the plaintiff's brush and a discarded bandage. It is in this context that the Kansas Supreme Court held that "excusable conduct based upon gathering privileged communications in connection with a judicial proceeding is not a defense to intrusion in this action." Id. at 996. This means that simply because the evidence was gathered for a judicial proceeding it is not ipso facto cloaked with immunity.

Judicial proceedings are privileged because of the overriding public interest in a free and independent court system. The defense of privileged communication therefore grants absolute immunity to otherwise actionable publications arising out of judicial proceedings. The evidence gathering in Froelich was not privileged because it did not involve publication. Thus, the logical force of Froelich is, like Dietemann, limited to the narrow proposition that privilege concepts of publication cases are not transferable to non-publication cases. It is still an open question as to whether gathering evidence, or some other form of conduct, is a compelling justification for intruding into another's private domain.[38/]

Further support for the position that there are justification/privilege defenses to an intrusion action can be found in Fowler v. Southern Bell Telephone & Telegraph Company, 343 F.2d 150 (5th Cir. 1965), a case brazenly cited by Plaintiffs for the proposition that no court has found an intrusion justified for the purpose of seeking evidence or exposing crime or fraud (App. Brief, p. 40). Whatever Fowler stands for, nowhere in the opinion is language which supports the Plaintiffs' contention. Fowler does not turn on the question of whether seeking evidence or exposing crime or fraud is a sufficient justification to warrant a limited intrusion into the individual's protected sphere of privacy.

Fowler involved an intrusion action against Southern Bell and two federal investigators who placed a wiretap on the plaintiff's telephone and recorded the

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38/ Froelich was an appeal from a non-jury trial. The case was remanded to the trial court because the trial judge failed to make findings of act. Id. at 996. It is interesting to note, that in a companion case, on the same facts, the Kentucky Supreme Court upheld the trial judge's directed verdict for the defendant, ruling "that as a matter of law there was no intrusion on the seclusion of the plaintiff sufficient to establish an invasion of privacy." (Emphasis added.) Froelich v. Werbin, 219 Kan. 461, 548 P.2d 482 (1976).

plaintiff's conversations with her physician. The trial court dismissed the complaint on, among others, the ground that the officers were immune from liability. The court of appeals reversed the dismissal, but not because the intrusion was unjustified; no court had reached that issue. Fowler was reversed and remanded because the defense of privilege was a question of fact and the trial court's record was inadequate to support any findings. To this end, the appellate court expressly held that on remand "[i]f it is established that [the officers] acted in the performance of their official powers and within the perimeter of their duties as federal officers, then the defense of privilege would be established as to them." Id. at 156. See also, McSurely v. McClellan, 753 F.2d 88, 114-15 (D.C. Cir. 1985) (agent liable for intrusion because his "manifestly excessive means" fell "within the outer perimeter of a public official's line of duty").

In short, Fowler stands directly for the proposition that all intrusions on privacy are not actionable, some being limited by the defense of privilege. In spirit, Fowler is wholly consistent with Emerson's construction of the California Constitution, which balances the incursion into individual privacy against a justifiable and compelling interest.

C. Public Interest Defense.

No court has expressly held that the defense of public interest is unavailable in an intrusion action. Pearson v. Dodd, 410 F.2d 701 (1969), is the most illustrative case on which to frame the issue of whether the defense of public interest is available, although it neither raised nor resolved that issue. That case arose out of the exposure of alleged misdeeds of a United States Senator by a newspaper columnist. Two of the senator's employees entered the senator's office and removed documents from his file without authority to do so. The files were copied and

replaced; the copies were then given to the reporter and published.

In Pearson, the court made two express conclusions of law: First, that the reporter's receipt of copies of documents knowing that they had been removed without authorization did not amount to an intrusion, Id. at 705; second, that the matters published were of public interest and therefore were no invasion of privacy. Id. at 706. The court's opinion is more important for what it did not say. Because the court found that the recipient of intrusively obtained documents was not an actionable intruder, it had no chance to rule on whether public interest was a defense to the intrusion.

Also, in Pearson, the reporters argued that the senator's employees had not committed an invasion of privacy, because their actions were privileged by a public policy in favor of exposing wrongdoing. Id. at 705. In support of this proposition the reporters cited the following comment from the Restatement:

> "An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it. . . ."

Restatement of Agency Second, Section 395, comment f (1958). Here again, however, there was no need for the court to rule on the employees' conduct and it did not.

Thus, Pearson leaves open the question of whether public interest is an available defense in an intrusion action. New York Times v. Sullivan, 376 U.S. 254 (1963) and Time, Inc. v. Hill, 385 U.S. 374 (1967), cited by Plaintiffs, do not even remotely address the issue; and, Dietemann v.

Time, Inc., 449 F.2d 245 (9th Cir. 1971) and Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) simply hold that the First Amendment is not a blanket immunity to an intrusion action.

In a case like Pearson, where public interest is the asserted defense, the question is whether the information is of public interest, which Pearson notes should not turn on the manner in which it was obtained. Id. at 705. To read Pearson consistently, it must be concluded that if public interest justifies the publication of the Senator's files and shields the reporters' conduct, that same underlying policy of the public's right to know must per force shield the manner in which the information was obtained, at least from a privacy action. If not, the public interest policy can be roundly defeated by asserting an intrusion claim rather than a publication claim.

The issue is pointedly raised by the facts of the present case. If there is an overriding public policy in exposing wrongdoing, and the Restatement[39/] suggests that there is, the manner of gathering the information as well as the subsequent exposure should be immune from liability. To immunize the publication but punish the manner in which it was obtained is to defeat the policy of ferreting out wrongdoing.

III

THE DEFENSE OF PRIVILEGE TO BREACHES OF CONFIDENCE AND FIDUCIARY DUTY WAS CORRECTLY APPLIED BY THE TRIAL COURT

In allowing the application of the defense of privilege, the trial court cited to two sections of the

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39/ Section 395 is not by its terms a privilege defense to an invasion of privacy. It releases an employee from liability for breach of a fiduciary duty when public policy demands that he serve some higher interest than his employer. But the analogy to the privacy context is compelling.

Restatement of Agency, Second and to the case of Willig v. Gold, 75 Cal. App. 2d 809, 171 P.2d 754 (1946). (App. 255-56.)

The first section cited by the court, Section 395, governs the business relationship between a principal and his agent. Its objective is to allow a principal the assurance that information obtained through the agency will not be used in competition with the principal to profit the agent. Section 395 is essentially a proscription against self-dealing, in that it is fundamentally unfair for an agent to steal his principal's trade secrets and thereafter set up a competing shop.

The trial court cited comment f of Section 395 which provides in part that:

> "An agent is privileged to reveal information confidentially acquired by him in the protection of a superior interest of himself or of a third person."

Comment g to Section 395 further provides for defenses which can be advanced against an action for breach of duty, referring to Sections 399 through 421A.

Section 418, cited by the trial court, provides that:

> "An agent is privileged to protect interests of his own which are superior to those of the principal, even though he does so at the expense of the principal's interests or in disobedience to his orders."

Between comment f to Section 395 and Section 418, an agent can defend an action for breach of his duties by setting forth facts which show that he was privileged to reveal confidential information and to act against his principal's interest or in disobedience of his orders, in order to protect the superior interests of himself and third persons.

In the present case, the Court found that Defendant delivered the documents to his attorneys

> ". . . because he believed that his life, physical and mental well-being, as well as that of his wife, were threatened because the organization was aware of what he knew about the life of L. Ron Hubbard, the secret machinations and financial activities of the Church, and his dedication to the truth. He believed that the only way he could defend himself, physically as well as from harassing lawsuits, was to take from Omar Garrison those materials which would support and corroborate everything that he had been saying within the Church about L. Ron Hubbard and the Church, or refute the allegations made against him in the April 22 Suppressive Person Declare. He believed that the only way he could be sure that the documents would remain secure for his future use was to send them to his attorneys, and that to protect himself, he had to go public so as to minimize the risk that L. Ron Hubbard, the Church, or any of their agents would do him physical harm." (A-App. 255).

The Court's findings were well supported by the testimony of Defendant and defense witnesses and by the documentary evidence introduced at trial.

The facts of this case are unique, and differ from the usual breach of duty actions in at least one major respect. By taking the documentation, Defendant never intended to enter into competition with Plaintiffs to his own profit. Rather, he did so to protect his own physical well-being and that of his wife. The interest in self-protection, the first law of nature, when balanced against an agent's duty of loyalty to his principal, weighs heavily in the scales of social values in favor of self-protection. Immunizing Defendant's conduct, under the circumstances of

this case, best serves and most effectively promotes the general welfare. If there are any facts to which Section 395, comment f and Section 418 are applicable, this case is certainly tailor-made for their application.

Plaintiffs characterize Defendant's action in delivering the documents to his attorneys as a "subjective assessment that it is personally advantageous." (App. Brief, p. 47). Such a statement is a mischaracterization of what occurred prior to Defendant delivering the documents to his attorneys, in that it fails to address the issue of Plaintiffs' dishonest conduct with respect to use of the documents and their actions and threats against Defendant himself. Although an agent must act in good faith toward his principal and maintain confidential information acquired through the agency relationship, the law also provides that an agent is under no legal duty not to disclose his principal's dishonest acts. Willig v. Gold, 75 Cal. App. 2d 809, 171 P.2d 754 (1946); Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850 (10th Cir. 1972) (citing Willig v. Gold, supra, with approval).

The case of Willig v. Gold, supra, cited by the trial court, has compelling application under the circumstances of the case at bar.

In the Willig case, Gold entered into an agency relationship with Willig in which he agreed to secure a purchaser for Willig's business in exchange for a commission. At the time, Willig's business was insured with premium payments measured by the volume of the business. Willig confidentially disclosed to Gold that he had misrepresented to his insurer the volume of his business, and thus the amount of premiums due to it.

After Gold secured a purchaser for the business, Willig refused to pay Gold the appropriate commission for his services. Gold then disclosed to Willig's insurer that Willig had misrepresented the amount of premiums due and entered into an agreement with the insurer to collect a percentage of its recovery against Willig. The insurers

filed suit against Willig for unpaid premiums, which was compromised for $30,000.00. Willig filed a complaint in intervention for, inter alia, recovery of the percentage collected by Gold on the theory that it was the fruit of a breach of a confidential relationship existing between principal and agent.

The trial court denied Willig recovery and Willig appealed.

On appeal, the court responded to Willig's breach of confidential relationship theory as follows:

> "Appellant's second claim is somewhat startling. He argues in effect that because of the agency relation which had previously existed, Gold was under a duty not to disclose to Rathbone, King and Seely (insurers) that Appellant had made false returns to them and as a result paid them a smaller premium than they were entitled to receive. He cites no case, and we are sure that none can be found, that an agent is under a legal duty not to disclose his principal's dishonest acts to the party prejudicially affected by them."
> Id. at 757. (Material in parentheses added.)

In the present case, what Plaintiffs contend is that Defendant was forever bound in silence, prevented from revealing the half-truths, frauds and lies he had discovered in the archive documents during his agency relationship. Although Defendant had openly reported his findings to Plaintiff Church, and had requested that the problems be dealt with and corrected, he was met with hostility and a security check order. Feeling that he could not continue in what he now saw was a continued perpetration of the half-truths, frauds and lies by Plaintiffs upon innocent Scientologists, including himself and his wife, Defendant decided to leave the Scientology Organization.

It was only after he left and was threatened by agents of Plaintiff Church and by the issuance of two Suppressive Person Declares, one of which falsely charged him with the commission of crimes, that Defendant retrieved the only evidence he knew that would support his defense to these crimes--the subject documents. He delivered these documents to his attorneys while in a state of complete and total fear of what Plaintiffs were doing and were going to do to him and his wife.

Because of the threats and attacks, Defendant acted to protect himself and his wife. The trial court found this interest was pursued in good faith and was superior to the protection of principal-agent confidentiality, particularly in view of the fact that the confidentiality was used to hide the perpetration of half-truths, frauds and lies affecting thousands of paying Scientology members and Defendant.

The theory enunciated in Willig, that a principal cannot maintain an action for breach of a confidential relationship where he thereby seeks to suppress evidence of fraud, squarely applies in this case. Comment f to Section 395 and Section 418 are in accord.

Willig v. Gold was cited with approval in the case of Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 852 (10th Cir. 1972). In Lachman, plaintiffs filed an action for breach of contract in which they alleged that defendant had disclosed the results of a directional survey of an oil and gas well. The survey had been performed pursuant to contract for plaintiffs. However, while doing the survey defendant discovered that the well was producing oil and gas from an adjoining tract not owned by plaintiffs. Defendant then notified the adjoining owners of their oil and gas rights. The owners sued plaintiffs and won a judgment establishing their rights to the proceeds of all oil and gas produced by the well and causing plaintiffs to plug the well at their boundary line.

When plaintiffs sued defendant for breach of contract, the trial court dismissed the suit on the ground

that "public policy 'will never penalize one for exposing wrongdoing . . .'" Id. at 852.

In affirming the decision of the trial court, the Court of Appeals stated:

> "In the present case, the appellee may reasonably have felt that in adhering to the terms of its contract with the appellants it was silently watching a crime being committed or facts developing into such an act. The fact that appellants did not release appellee from its promise once it was on notice that the well was pumping gas from adjoining tracts or to have taken some action themselves may have led appellee to believe that they planned to take advantage of the adjoining owners.
>
> By holding that appellee breached its contract, we would, in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed." Id. at 853-54.

The Lachman court focused on the reasonable belief of the Defendant that a crime might be committed by plaintiff if the information was not revealed. It is clear that the court would not place defendant in the "precarious" position of maintaining confidentiality in such a situation. Even the trial court acknowledged that one should not be penalized for exposing wrongdoing.

A. The Five Reasons Advanced By Plaintiffs As The Basis For The Trial Court's Error In Applying The Restatement And The Case Of Willig v. Gold Are Not Viable.

1. An Agent Need Not Always Prefer His Principal's Interest Over His Own.

Plaintiffs argue that Section 418 of the Restatement, Comment b, compels an agent to prefer his principal's interests over his own where the agent has acquired things in violation of his duty of loyalty.

Plaintiffs contend that by retrieving documents from Omar Garrison after termination of the agency relationship, Defendant breached his duty of loyalty and was thus required by Section 418, Comment b, to give preference to Plaintiffs' interest in the use of the documents. They distinguish Willig v. Gold, supra, by arguing that the agent acquired the information without breaching his duty of loyalty and thus had no need to maintain confidentiality.

Plaintiffs' highly technical argument must fail for several reasons.

First, Defendant obtained the information and documentation evidencing half-truths, frauds and lies during an agency relationship. The trial court found that he had permission and authority from Plaintiffs to provide Omar Garrison with the documents and further had permission from Omar Garrison to deliver the documents to his attorneys. (A-App. 254).

Second, even if Defendant took advantage of his confidential relation by taking documents from Omar Garrison and delivering them to his attorneys, he did so in order to protect a superior interest of his own and his family, and to expose wrongdoing by Plaintiffs. Section 396 of the Restatement of Agency cited by Plaintiffs refers in Comment e to Sections 399-421A as defenses to which an agent is entitled. Thus, the principle of Section 418 can be used as a defense to an alleged breach of duty following termination of the agency relationship.

Third, the Willig and Lachman cases establish that an agent need not give preference to his principal's interests in every instance. Most particularly, an agent

need not perpetrate the wrongs of his principal where he is placed in the conflicting situation of revealing the truth or maintaining the silence necessary to the perpetration of the wrong.

2. Disclosure Of Customer Lists Goes To Unfair Competition Which Is Not An Issue In This Case.

Plaintiffs contend that even if Defendant were privileged to report to others what he had learned from the documents, he was not entitled to retain or disseminate the documents, citing Comment b of Section 396, Restatement of Agency, Second. The portion of Comment b referred to by Plaintiffs deals with the use of customer lists in unfair competition.

The present case has nothing to do with unfair competition or profit. There is no evidence to show that Defendant used the documents to set up shop in competition with his principal or to make a profit therefrom. Defendant used the documents for an entirely different purpose--as evidence of the truth of his statements to his principal, that his principal was involved in the perpetration of fraud upon innocent Scientologists and himself.

Further, Plaintiffs' citation to Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) is misplaced and misleading. Dietemann does not involve issues of breach of fiduciary duty and is wholly inapplicable to any discussion of the same. The Dietemann court's statement that conversations between individuals may be repeated but surreptitious recordings of the same may not (Id. at 249), does not have any bearing on the use of the documents by Defendant herein.

3. Immediate Necessity Is Not A Requirement Of The Defense Presented In Section 418 Of The Restatement Of Agency, Second.

Without any legal support, Plaintiffs argue that "When defendant's common law fiduciary obligations are added to the privacy protections of the California Constitution, the rule that defendant must show an absolute necessity for his unilateral appropriation of the documents is doubly required." (App. Brief, p. 50).

To support the contention that "immediate action" and "emergency" are requirements to assert the defense set forth in Section 418, appellants cite Patrick v. Cochise Hotels, 76 Ariz. 136, 259 P.2d 569 (1953) and Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 151 P.2d 334 (1976).

The Patrick decision, like other unfair competition cases, turned on the self-dealing of the agent. Patrick, involved an agent in a dual role as a hotel manager with a beneficial interest in a second mortage in his principal's hotel. When the taxes on the property became overdue, the agent paid them with his own funds and declared the debt due under the acceleration clause of the second mortgage. Although the court cited Restatement of Agency Section 418, its decision was based on the fact "that [the agent's] dealings . . . were unfair to the principal . . .", 259 P.2d at 574.

Patrick was not a case where the privilege of the agent to protect himself was called into question. There was no competing interest of the agent and the principal at stake. This is reflected in the court's holding that the agent "would have suffered no harm nor would he have been deprived of his rights by acting fairly and above board, and when no detriment would result to him, it was clearly his duty to give his principal an opportunity to meet the situation." Id. at 574.

Nor does Patrick state that there be an "emergency" requiring "immediate action" before an agent can protect his interest. The emergency language is limited to the facts of that case. The court explicitly held that "an agent cannot without notice sacrifice his principal's interest in the

property unless immediate action is necessary to save the lien of the agent." Id. Since the agent's interest (a lien) was not threatened, their was no justification, except profit, for the agent's actions.

Likewise, Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 151 P.2d 334 (1976), does not establish the rigid standard that the Plaintiffs suggest. Tarasoff involved an action against a psychotherapist by parents of a girl who was killed by a man who had confided his intention to kill the girl to the therapist. The focus of the Tarasoff case is the court's discussion of the psychotherapist-patient privilege. With respect to that issue, the court simply concluded that disclosure of a confidence must be reasonably tailored to meet the competing interest of the patients to privacy and the public interest in safety. Id. at 441. There was no citation to Section 418.

4. In Order To Maintain The Defense Of Privilege It Was Not Necessary For Defendant To Prove That The Documents Were Fruits Or Instrumentalities Of Crime Or Fraud.

Plaintiffs cite three cases, hereinafter discussed, for the theory that the "justification defense" is inapplicable because "defendant's purported subjective belief was not that the documents were fruits or instrumentalities of crime or fraud, but merely that the documents might contain circumstantial, hearsay evidence from which an inference of wrongdoing might be drawn." (App. Brief, p. 52).

None of the three cases cited by Plaintiffs address this issue.

The first case, Suburban Trust Co. v. Waller, 408 A.2d 758 (Md. App. 1979), is factually inapposite. Suburban Trust stands for no more than the proposition that a bank, absent legal compulsion, cannot disclose information regarding a depositor's account. The Plaintiffs' reliance on

this case ignores the fundamental distinction between the relationship of a bank to its depositor and a principal to its agent. It is the nature of the bank-depositor relationship and the depositor's right to secrecy that warranted the strict confidence in Suburban Trust. This right to secrecy was bottomed on positive federal and state statutes. See Right to Financial Privacy Act of 1978, Section 1101, (1978); Md. Ann. Code art. 11, Section 227(a).

Plaintiffs next cite State v. McCray,. 551 P.2d 1376 (Wash. App. 1976), as the sole exception to the rule that a bank may not, without legal compulsion, disclose confidential documents. Of all the cases cited, McCray is the least applicable to the facts of this case. First, McCray did not involve the disclosure of any confidential documents. The defendant in McCray made a Fourth Amendment challenge to information about the status of the defendant's bank account given to the police over the telephone by bank officials. The defendant asserted "that the obtaining of the information by the police from the defendant's bank without a search warrant or other legal process such as a subpoena was an illegal search and seizure." Id. at 1378. By no stretch of the imagination is McCray, a Fourth Amendment search and seizure case, remotely applicable to this case.

Likewise, the third case, Abkco Music, Inc. v. Harrisongs Music Ltd., 722 F.2d 988 (2d. Cir. 1983), is inapposite to this case and adds nothing to resolve the issue. Abkco was a copyright infringement action. When an agent, in possession of confidential information obtained from his former principal, used that information against his principal in settlement negotiations to dispose of the copyright suit, the Abkco court correctly held the agent to have breached his fiduciary duty as defined by Section 396 of the Restatement. It is illogical that Plaintiffs, in view of the court's conclusion, cite this case for the broad proposition that a defendant is not justified in using confidential documents simply because they may be helpful to him in bringing or defending a civil lawsuit. (App. Brief,

p. 53). The court put Abkco squarely in context when it concluded that "this case is analogous to those where an employee, with the use of information acquired through his former employment relationship, completes, [sic] for his own benefit, a transaction originally undertaken on the former employer's behalf." Id. at 996. Abkco is simply another inapplicable self-dealing case cited by Plaintiffs.

5. The First Amendment Has No Application to Defendant's Defense Of Privilege.

Plaintiffs raise the argument, as they did before the trial court, that the First Amendment bars adjudication of Church doctrine and the Founder's background, his accomplishments and role in the Church. The First Amendment bars only the judicial determination of the truth or falsity of religious belief. United States v. Ballard, 322 U.S. 78 (1944).

As stated by the trial court, no inquiry was made in this regard:

> "Plaintiff Church has asserted and obviously has certain rights arising out of the First Amendment. Thus, the court cannot, and has not, inquired into or attempted to evaluate the merits, accuracy or truthfulness of Scientology or any of its precepts as a religion. First Amendment rights, however, cannot be utilized by the Church or its members, as a sword to preclude the defendant, whom the Church is suing, from defending himself. Therefore, the actual practices of the Church or its members, as it relates to the reasonableness of the defendant's conduct and his state of mind are relevant, admissible and have been considered by the court." (A-App. 256-77.)

The U.S. Constitution gives every person the absolute right to believe what he wants, but does not create

a license to do or say anything in the name of religion. In Cantwell v. Connecticut, 310 U.S. 296, 303-04, the Supreme Court stated:

> "The Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."

In Cantwell, the Court struck down a state criminal statute barring the solicitation of money by a religious organization without the prior approval of the Secretary of a state agency. The Court, however, made it very clear that its decision did not apply to fraudulent practices:

> "Nothing we have said is intended even remotely to imply that under the cloak of religion persons may, with impunity, commit frauds upon the public . . . the state is . . . free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience."

In U.S. v. Ballard, 322 U.S. 78 (1944) the Supreme Court specifically dealt with the issue of a First Amendment "religion" defense in a fraud case. In Ballard, the "I Am" movement was charged with mail fraud for soliciting funds through false representations. The defense was that the representations were religious in nature and therefore immune from inquiry. The Federal District Court had ruled with the acquiescence of all counsel that the representations were religious in nature and that the standard to be applied in instructions to the jury was not the truth or falsity of the assertions made by the Defendants but:

> "Did these defendants honestly and in good faith believe those things?" (322 U.S. at 81).

The "good faith" standard has stood for thirty-five years and has been applied in a variety of contexts, notably selective service litigation. See U.S. v. Seeger, 380 U.S. 163 (1964). The rule means simply that where a religious defense is interposed, the trier of fact may not look to the truth or falsity of a religious belief but only the questions of whether a belief is sincerely held. Conversely, a Defendant raising a "religion" defense may be required to show that he holds his beliefs sincerely and not as a mere pretext to avoid some legal duty or restriction. Such a rule is obviously necessary lest the First Amendment become a shelter for any unscrupulous Defendant regardless of the actual circumstances of his spiritual life.

Here, Plaintiffs cannot hide behind the First Amendment or use it as a sword to prevent Defendant from defending himself against their allegations. Plaintiffs make no showing in the record of where the trial court inquired into the truth or falsity of religious beliefs. The trial court plainly states that it made no such inquiry, and, in fact, did not.

IV

THE TRIAL COURT'S APPLICATION OF THE RESTATEMENT OF TORTS, SECOND, SECTION 261 AS A DEFENSE TO PLAINTIFFS' CONVERSION CLAIMS DID NOT REQUIRE DEFENDANT TO PROVE HE WAS IN IMMEDIATE PHYSICAL DANGER AT THE TIME OF THE ALLEGED CONVERSION

A. Defendant Need Show Only That A Reasonable Man Believed A Danger Existed, Even If It Did Not.

In their discussion of the trial court's application of Section 261 of the Restatement, Plaintiffs either completely ignore or misstate the factual circumstances considered by the trial court in reaching its decision to allow application of Section 261 as a defense.

As demonstrated in the Statement of Facts, there was ample evidence presented through the testimony of Defendant and defense witnesses that Defendant was under a reasonable apprehension of danger at the time he delivered the documents to his attorneys.

Although Defendant believed actual danger was upon him, the law does not require that Defendant's belief be true. Plaintiffs miss this distinction in arguing that it was necessary for Defendant to be "faced with a present and immediate danger of physical injury." (App. Brief, p. 58).

Under comment b to Section 261, an actor is

> ". . . privileged to make intentional invasion of another's interests of personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, or that such invasion of his interests is reasonably probable . . ."

And:

> "The privilege also exists when although the actor knows that the person in possession of the chattel does not intend to inflict harm upon the actor, he reasonably believes that such harm is likely to result from the possessor's negligent conduct."

A reference to Section 63 of the Restatement of Torts, Second, follows each of the above-referenced statements. Section 63 deals with the subject of self defense. Under comment h to that Section, it provides:

> "The privilege stated in this Section exists if the actor reasonably believes that the other intends to inflict a harmful or offensive contact upon him, even

> though the other has in fact no such intention."[40]

With emphasis placed on the reasonable belief of the actor, the facts of the "attack" as seen through the actor's eyes must be consulted against a reasonableness standard. As aptly stated by Dean Prosser:

> "Evidence as to his (the actor's) state of mind and nerves, and the threats, past conduct, and reputation of his assailant which may have induced it, is important and admissible on the issue of what was reasonable, which is frequently for the jury, but the standard to be applied is the external one of reasonable conduct." Prosser, Law of Torts, page 125 (5th Ed. 1984).

Plaintiffs argue that Defendant failed to introduce one "shred of evidence" to prove that he apprehended present and immediate danger "at points in time pertinent to the conversion claim." (App. Brief, p. 58). Those points in time are enumerated as December, 1981 when Defendant left the Church of Scientology, taking the last documents and delivering them directly to Mr. Garrison pursuant to his job duties;[41] as spring and summer of 1982 when Defendant acquired documents from Mr. Garrison's storage;[42] and as May

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40/ Defendant does not mean to imply that Plaintiffs had no intention of inflicting harm upon him, but wishes rather to establish that the emphasis is placed on the reasonable belief of the actor and not upon the actual infliction of harm by another.

41/ Plaintiffs state simply that Defendant "took" documents from the Church without adding that they were delivered directly to Mr. Garrison who was authorized to receive them. Thus, there was no conversion.

42/ The trial court found that Defendant obtained documents from Mr. Garrison with permission.

of 1982 when Defendant "failed to respond to the Church's demand letter."[43/] Plaintiffs further contend that the "protracted and ongoing nature of defendant's conversion itself definitively contradicts any claim that he took them to defend himself against a present assault at any given point in time." (App. Brief, pp. 58-59).

Initially, it should be clarified that the trial court made no finding that Defendant committed conversion of a protracted and ongoing nature. Rather, the trial court specifically found that Defendant had permission and authorization to provide Mr. Garrison with all documents and materials ultimately given to him, and further, that Defendant had permission from Mr. Garrison to take and deliver to his attorneys those documents and materials which ulimately came into the custody of the County Clerk (A-App. 254). The thrust of the trial court's finding of a prima facie case of conversion is based upon Defendant's use of the documents and materials in a manner that exceeded his authorization--delivery of documents and materials to his attorneys for purposes other than the preparation of an authorized biography of L. Ron Hubbard.

However, Defendant's state of mind, his nerves, threats made to him, past conduct of Plaintiffs and the reputation of Plaintiffs all have bearing on the reasonableness of his belief that he was in present danger when he sent documents to his attorneys. The history of what occurred to Defendant and his extensive knowledge of the

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43/ There were two letters written by attorney John Peterson to Defendant. The first was dated May 26, 1982 (Exh. 17) and the second was dated May 27, 1982 (Exh. 18). Defendant testified that he never received the first letter (RT 2381) and Mr. Peterson testified that he had no knowledge that Defendant ever received the letter (RT 1162). Defendant did, however, receive the second letter (Exh. 18) and responded by letter of June 9, 1982 (Exh. 19). At the time Defendant wrote the letter of June 9, he had sent no documents to his attorneys.

malicious conduct Plaintiffs were capable of are key to the trial court's allowance of the defense of privilege set forth in Section 261. Plaintiffs have completely avoided a discussion of those facts.

Defendant will not repeat the factual background as presented through weeks of trial testimony since it is essentially summarized in the Statement of Facts, supra. However, those facts show that in the mind of Defendant, the reputation and actions of Plaintiffs were far from benevolent. Over the years of his membership, Defendant was the victim of repeated imprisonments in the RPF for so-called infractions, and was held to perform menial labor, live in substandard conditions and eat leftover scraps of food. He was the subject of hundreds of Security Checks, better described as interrogation sessions in which he answered numerous questions regarding supposed transgressions while attached to a crude lie detector. He was ordered to participate in the vetting and shredding of security threatening documents because of the fear of the Organization and the Hubbards that government agencies would find incriminating evidence. He was ordered to cull supposedly confidential pre-clear files to find "crimes" which could be used for blackmail and attack purposes. He was forced to sign non-disclosure and release forms holding Plaintiffs harmless from any conduct and promising not to divulge their tortious conduct. He was a member of the infamous Guardian's Office of Plaintiff Church, headed by Mary Sue Hubbard, where he learned about the covert intelligence mechanisms used to investigate, surveil, infiltrate, discredit and destroy "enemies" of Scientology and the Hubbards. These intelligence mechanisms included numerous written policies such as the Fair Game Doctrine, Black Propaganda, Vetting Hat Write Up, G.O. 121669 and the G.O. Intelligence Full Hat.

During his membership with Scientology, Defendant's predominant emotion was fear, and for good reason. His state of mind was filled with what the Plaintiffs were capable of

doing to those they considered their enemies. When Defendant, during his work as biography researcher and Hubbard archivist, discovered the ultimate fraud regarding the alleged background and achievements of L. Ron Hubbard, he was met with open hostility and ordered to be security checked. This is so even though Defendant attempted, through honest endeavor, to correct the frauds by making them known to organizational heads. Only when his endeavors were thwarted and met with paranoiac reaction, did Defendant begin to realize that he would be treated no differently than any other "enemy" of Plaintiffs. And, in fact, he was not. Defendant was declared an enemy and accused of "crimes" before he delivered any documents to his attorneys. His only real "crime" was that he had attempted to be honest in an organization whose leaders did not understand the meaning of the word, whose leaders ran the Guardian's Office and promulgated written policies on covert intelligence operations and the attack of enemies.

It was with this state of mind that Defendant interpreted the actions of Plaintiffs after he left the Organization in December, 1981. The declaration of Defendant as an enemy, the early surveillance, the taking of Defendant's photographs, the threat of litigation, the contacts made with Defendant's family and friends by G.O. Intelligence agents, meant only one thing to Defendant--that he was under direct attack. Based upon his past knowledge, his belief was reasonable.

In the case of Pearson v. Taylor, 116 So. 2d 833 (1959), the Court of Appeal of Louisiana held that for the privilege of self-defense to exist:

> ". . . it is not necessary that the danger actually exist. It is only necessary that the actor have grounds which would lead an ordinary reasonable man to believe it exists, and that he so believe. All the facts and circumstances of the case are to be taken into account to

determine the reasonableness of the belief." Id. at 835.[44]

In the present case, based upon twelve years of knowledge and experience as to how the Organization handled "enemies" and "suppressive persons," Defendant was in terror as to what the Plaintiffs would do to him. Knowing that he was falsely accused of spreading lies about Hubbard and Scientology through the guise of documentation and further being accused of altering documents, Defendant felt the only way he could protect himself was to obtain documents supporting all that he had stated and discovered about Hubbard, and deliver them to his attorneys for safekeeping.

The trial court found that Defendant took the documents because:

> ". . . he believed that his life, physical and mental well being, as well as that of his wife were threatened because the organization was aware of what he knew about the life of L. Ron Hubbard, the secret machinations and financial activities of the Church, and his dedication to truth. He believed the only way he could defend himself, physically as well as from harassing lawsuits, was to take from

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44/ See also, Boyer v. Waples, 206 Cal. App. 2d 725, 24 Cal. Rptr. 192 (1962) in which the court admitted evidence of a series of acts of misconduct directed against defendant over a period of time which formed the basis for the reasonableness of defendant's conduct in shooting 18 times at the plaintiffs. The court found defendant's conduct reasonable even though, on the night of the shooting, the plaintiffs did not advance upon the defendant or threaten him personally. Id. at 729-30.

> "We cannot say as a matter of law that the defendant was not acting as a reasonable man in the circumstances shown by the evidence, considering his knowledge of the character and previous activities of the plaintiffs . . ." Id. at 730.

> Omar Garrison those materials which would support and corroborate everything that he had been saying within the Church about L. Ron Hubbard and the Church, or refute the allegations made against him in the April 22 Suppressive Person Declare. . . .
>
> This conduct if reasonably believed in by defendant and engaged in by him in good faith, finds support as a defense to plaintiff's charges in the Restatement of Agency, Torts, and case law." (A-App. 255.)

The trial court heard the extensive testimony and observed the witnesses during the trial. It is clear that the testimony of Defendant was compelling and that the court found the actions of Defendant reasonable under the circumstances. The findings of the trial court upon questions of fact, as are principally involved in determining reasonable conduct, are entitled to great weight. Pearson, supra, at 837. In order to secure a reversal, Plaintiffs must show manifest error in the judgment. Id. Under the facts of this case, it is obvious that no such manifest error exists.

B. Defendant Is Not Liable For Conversion On Other Grounds As Well.

1. The Case Of Pearson v. Dodd Exonerates Defendant From Liability.

In the case of Pearson v. Dodd, 410 F. 2d 701 (D.C. Circuit 1969), the court was faced with a fact situation closely analogous to the one at bar in which the plaintiff had sued for conversion, among other things. The facts of the Pearson case were stated above and will thus not be repeated here.

In that case, the trial court had granted partial

summary judgment to plaintiff Senator Dodd on the theory of conversion. On appeal, however, the District Court of Appeal reversed.

In its analysis, the court drew on the distinction between conversion and trespass to chattels, and in finding no conversion had occurred, stated as follows:

> "It is clear that on the agreed facts appellants (defendants) committed no conversion of the physical documents taken from appellee's (plaintiff's) files. Those documents were removed from the files at night, photocopied, and returned to the files undamaged before office operations resumed in the morning. Insofar as the documents' value to appellee resided in their usefulness as records of the business of his office, appellee was clearly not substantially deprived of his use of them." Id. at 707.

The Pearson court also addressed the question of whether the information taken by means of copying Senator Dodd's office files is of the type which the law of conversion protects. The court stated as follows:

> "The question here is not whether appellee had a right to keep his files from prying eyes, but whether the information taken from those files falls under the protection of the law of property, enforceable by a suit for conversion. In our view, it does not. The information included the contents of letters to appellee from supplicants, and office records of other kinds, the nature of which is not fully revealed by the record. Insofar as we can tell, none of it amounts to literary property, to scientific invention, or to secret plans formulated by appellee for the conduct of commerce." Id. at 708.

The court went on to state:

> "Appellee complains, not of the misappropriation of property bought or created by him, but of the exposure of information either (1) injurious to his reputation, or (2) revelatory of matters which he believes he has a right to keep to himself. Injuries of this type are addressed at law by suit for libel and invasion of privacy respectively where defendants' liability for those torts can be established under the limitations created by commonlaw and by the Constitution."
> Id. at 708.

The documents in question are comprised, for the most part, of letters to and from various individuals, as well as naval records, various certificates of Hubbard, documentation regarding legal and financial matters, public relations documentation, two cassette tape recordings regarding funnelling of monies to Hubbard, photographs, an unpublished manuscript entitled "Excalibur", and other materials.

As in Pearson, the subject documents are mainly letters and memoranda, with a very minute portion related to literary work. There is no evidence in the record to show that Defendant converted the physical contents of any literary or scientific work.

It must be remembered that unlike the cases cited by Plaintiff and Intervenor, such as Carpenter v. Oakes, this case involves documentation and materials which contain evidence of fraudulent misrepresentations. In that regard, it is the contention of Defendant that he committed neither conversion nor invasion of privacy nor breach of fiduciary duty/confidence because of a privilege based upon a public policy in favor of exposing wrong-doing, fraud, and crime. Pearson, supra, at 705 n. 19.

Defendant has found no case in any jurisdiction throughout the United States that allows a cause of action

for conversion of documents and information. Indeed, every case which Defendant has found has held that there is no cause of action for conversion of documents and information and where such documents or information constitute literary works or commercial instruments, the appropriate cause of action is for copyright infringement and not for conversion. Further, in every case which Defendant has located where documents and information have been involved, the courts have generally found some type of legal justification or privilege attaching to the possession of the documents and/or dissemination of information in the documents based on legal privilege.

The Pearson case, supra, specifically held that the surreptitious copying of the contents of the plaintiff's office files by the plaintiff's employees and the delivery of the copies given to the defendants, did not constitute conversion because the plaintiff was not substantially deprived of the use of the files and because the information contained in the files did not fall "under the protection of the law of property enforceable by a suit for conversion." 410 F.2d at 708. The Pearson case has been recognized by the Second District Court of Appeals of California in the case of People v. Kunkin, 24 Cal. App. 3d 447, 100 Cal. Rptr. 845, (1972). The court in the Kunkin case analyzed the Pearson v. Dodd case at length, distinguished it from the facts in that case relating to the definition of "stolen property" and concluded as follows:

> "The specific holding in Dodd was that the documents and information involved were not the type of intangible property whose appropriation could support an action in conversion. In so ruling, the court stayed within the traditional boundaries of the law of conversion, which in dealing with intangible rights relating to documents has limited its scope to conversion of intangible rights which have merged into documents (checks, notes, stock certificates,

> warehouse receipts). [Citation omitted.] Patently, Dodd does not hold that documents are not property. Rather it holds that information in non-commercial documents is a form of property for whose appropriation an action in conversion will not lie." Id. at 459.

The legal principle that information cannot be "converted" was upheld in the criminal case of U.S. v. Truong Dinh Hung, 629 F.2d 908, 922 (4th Cir., 1980), wherein the Fourth Circuit Court of Appeals interpreted the language of 18 U.S.C. § 641. That statute renders criminally liable any person who "converts to his use or the use of another, or without authority, sells, conveys or disposes of anything of value of the United States." Defendants were convicted under that statute on the theory that they converted government property in the form of classified information when they stole copies of secret documents in the possession of the United States Information Agency. The court thereafter upheld the defendant's argument that "information cannot be 'converted' because the common law tort of conversion requires that the legitimate owner be deprived of possession," citing the Pearson case. The court thereafter held that the espionage statutes relating to the theft of classified information applied to the facts of that case but that the "conversion" statute was inapplicable.

There is also a line of cases which hold that the conversion of documents and information which fall within the category of literary works and intellectual "property" cannot be converted because the appropriate cause of action is for copyright violation.

The case of Harper & Row Publishers, Inc. v. Nation Enterprises, 501 F. Supp. 848, 852-854 (S.D.N.Y., 1980), involves the wrongful taking and possession of a copy of the unpublished manuscript of President Gerald Ford's memoirs. The plaintiff in that action claimed that the unlawful possession of the memoirs constituted the tort of conversion.

The Court held that the conversion claim was "preempted" by the New York Copyright Act and dismissed the claim for conversion.

The Federal District Court for the Southern District of California in the case of Pickford Corporation v. De-Luxe Laboratories, 169 F. Supp. 118 (S.D. Ca., 1958), supplemental opinion to 161 F. Supp. 367 (S.D. Cal. 1958), reached the same result as the Harper & Row case. In the Pickford case, a conversion action was brought under California law by the owner of the original negatives of a motion picture film against the bailee to whom the negatives had been delivered by the owner so that the bailee could make prints of the film on order of the owner. The bailee thereafter exhibited the film on television. In its first opinion, the Court held that the conversion action was barred by the statute of limitations. In its second opinion, the Court held that an action for conversion is "wholly inconsistent with an action for copyright infringement in that plaintiff's claim in that case was essentially for copyright infringement which was also barred by the Statute of Limitations." 169 F. Supp. at 120. The Court relied on the case of Italiana v. Metro-Goldwyn Mayer, 45 Cal. App. 2d 464, 114 P.2d 370, (1941), in support of the argument that the taking of "an intangible incorporeal right" cannot constitute a violation of the law of conversion. Other cases have reached the same result. See Local Trademarks, Inc. v. Price, 170 F.2d 715, (5th Cir. 1948) where the Fifth Circuit Court of Appeals held that an action for infringement of copyright is not an action for conversion of personal property.

In the present action, the documents and information now held under seal do not constitute either (a) literary property, or (b) documents of a commercial nature. Therefore, the documents and information are not such "property" as to support an action for copyright infringement. Indeed, there can be no showing that Defendant in this case has attempted to publish or gain an economic

advantage as a result of his possession of the documents and information. Secondly, Plaintiffs have not been deprived of the use of the documents and information because they have possession of the copies and access to the originals presently under seal. Third, the documents and information under seal fall squarely within the holding of the Pearson v. Dodd case which held that the type of documents and information involved in that case, which are identical to the type of documents involved in the present case, cannot support an action for conversion.

V

THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFFS HAD UNCLEAN HANDS AS TO THE EQUITABLE CAUSE OF ACTION FOR INJUNCTION

In arguing that the trial court's "justification defenses" would not defeat Plaintiffs' claim for injunctive relief, Plaintiffs fail to note that the trial court specifically found Plaintiffs to have unclean hands:

> "As to the equitable actions, the court finds that neither plaintiff has clean hands, and that at least as of this time, are not entitled to the immediate return of any documents or objects presently retained by the court clerk." (A-App. 251)

Because Defendant did not introduce all of the documents into evidence,[45/] the trial court maintained the original sealing order as to all documents in the possession of the clerk and not marked as trial exhibits (A-App. 252).

45/ Defendant introduced 124 of the documents into evidence. Plaintiff Mary Sue Hubbard introducted 62 of the documents into evidence. The trial court unsealed all documents introduced as exhibits with the exception of 22 such exhibits which the court maintained under seal (A-App. 252 fn. 1).

The original sealing order will remain in effect until trial court proceedings are concluded as to Defendant's severed cross-complaint (A-App. 252).[46/]

Thus, the only documents not subject to injunction are those which are now trial exhibits not specifically maintained under seal by the court.

In addition to arguments set forth infra, which show the established requirement for public disclosure of the evidentiary record in a court proceeding, Plaintiffs' arguments in support of injunctive relief must fail for the following reasons.

A. Clear Abuse Of Discretion And Lack Of Substantial Evidence Must Be Shown.

The denial or dissolving of a permanent injunction rests within the sound discretion of the trial court and will not be disturbed absent a showing of a clear abuse of discretion. San Diego Union v. City Council, 146 Cal. App. 3d 947, 952, 196 Cal. Rptr. 45 (1983). Discretion is abused when a court exceeds the bounds of reason or contravenes uncontradicted evidence. Jessen v. Keystone Savings and Loan Assn., 142 Cal. App. 3d 454, 458, 191 Cal. Rptr. 104 (1983).

In the present case, the trial court found that Plaintiffs did not have clean hands as to their equitable claims. It was within the discretion of the trial court to apply or reject the clean hands doctrine. Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (1969). Where the court finds, as it did here, that Plaintiffs violated the clean hands doctrine, Plaintiffs will be denied all relief, no matter what the merits of their claim. Hall v. Wright, 125 F. Supp. 269 (D.C. Cal. 1954), aff'd. 240 F.2d 787.

46/ Defendant's cross-complaint is set for trial on September 29, 1986 before the same trial court.

The application of the clean hands doctrine is primarily a question of fact. Insurance Co. of North American v. Liberty Mutual Insurance Co., 128 Cal. App. 3d 297, 180 Cal. Rptr. 244 (1982). Where factual findings are supported by substantial evidence, they may not be disturbed on appeal. Lemat Corp. v. American Basketball Assoc., 51 Cal. App. 3d 267, 124 Cal. Rptr. 388 (1975).

In the present case, the issue of the denial of equitable relief is based upon the trial court's finding of unclean hands. Thus, review, if any, turns on whether there was substantial evidence to support the trial court's findings and whether the trial court clearly abused its discretion in denying the equitable relief requested. These issues are discussed, infra, under section VI, regarding the unclean hands defense. As shown in that section, there was ample evidence for the trial court to find unclean hands.

In order for Plaintiffs to obtain injunctive relief, the appellate court would first have to find that there was no substantial evidence in favor of the Defendant on the clean hands defense, and second, that the court abused its discretion in denying the injunctive relief requested.

As shown in section VI, infra, both these issues must be answered in the negative.

B. The Cases Cited By Plaintiffs Have No Application Here.

Plaintiffs contend that "the undisputed facts--and the facts found by the trial court--establish conclusively" (App. Brief, p. 64) that Plaintiffs suffer continuing harm, and that, as a matter of law the defenses invoked by the trial court lapsed long ago.

Plaintiffs further argue that where ultimate facts are undisputed, the question of whether a permanent injunction should issue becomes a question of law for the appellate court to determine without regard to the trial court's conclusions. Id.

First, Plaintiffs fail to cite to the record (and Defendant knows of no such citation) to show the alleged "undisputed facts" that "conclusively establish" Plaintiffs' right to injunctive relief. The facts as found by the trial court were the basis for denying injunctive relief based upon the clean hands doctrine.

Thus, the appellate court cannot determine the matter without regard to the findings and conclusions of the trial court.

The cases cited by Plaintiffs to support their argument that they continue to suffer continuing harm are inapplicable. Carpenter Foundation v. Oakes, 26 Cal. App. 3d 784, 103 Cal. Rptr. 368 (1972) involved no issue of unclean hands. Further, the defendant in that case used the confidential written materials for publication and personal economic gain causing a continuing harm. The same is true in the cases of Greenly v. Cooper, 77 Cal. App. 3d 382, 143 Cal. Rptr. 514 (1978), and American Loan Corp. v. California Commercial Corp., 211 Cal. App. 2d 515, 27 Cal. Rptr. 243 (1963), where the defendants used trade secrets and customer lists for their own economic advantage and to the detriment of their employers.

In fact Greenly and American Loan Corp. actually support Defendant's arguments in that both those courts recognized the need to resolve all conflicting factual evidence in favor of the trial court's decision. Greenly, supra, at 520-21; American Loan Corp., supra, at 246.

The case of Krzyske v. United States, 578 F. Supp. 1366 (ED. Mich. 1984) cited by Plaintiffs is not an injunction case. That case involved an appeal from the granting of a motion to dismiss brought by the government. The court found that the plaintiff taxpayer had no standing to challenge the issuance of a summons by the I.R.S. to plaintiff's employer for payroll information and granted the government's motion to dismiss. The court did note that disclosure of the information to the I.R.S. did not render the controversy moot, but because the plaintiff had no

standing, the issue of disclosure was not discussed. Thus, the Krzyske case does not aid Plaintiffs.

Plaintiffs cite additional cases to support their argument that because the grounds for the justification defenses have lapsed, they are now entitled to injunctive relief (App. Brief, p. 66-68). Plaintiffs cite the case of United States v. Farrell, 606 F.2d 1341 (D.C. Cir. 1979), for the proposition that "the Government's right to seize and retain certain evidence for use at trial does not in itself entitle the state to its retention after trial." Id. at 1347.

In the Farrell case, however, the court did permit retention of the evidence seized, which evidence was $5,000.00 in currency used for a drug transaction. Importantly, the grounds upon which the Farrell court allowed the retention involved equitable considerations. The court found that pursuant to the maxim, "neither party to an illegal contract will be aided by the court, whether to enforce it or set it aside," the court would not allow itself to be used by the wrongdoer for return of the money. Id. at 1348-49. That was true in Farrell even though the drug transaction had long ago transpired and there was no further evidentiary need for the money. The public policy in favor of maintaining equity outweighed the request for return of the property.

Thus, the Farrell case actually supports the trial court's finding here, that based upon Plaintiffs' unclean hands, they are not entitled to return of the documents.

Further, an additional consideration not addressed by Plaintiffs should be noted. The trial court was mindful that Defendant's cross-complaint must still be tried and that Defendant intends to use the documents as evidence (A-App. 252). Thus, the evidentiary utility of the documents has not yet been exhausted and the trial court maintains jurisdiction over them (A-App. 254).

VI

THE TRIAL COURT PROPERLY APPLIED THE DEFENSE OF UNCLEAN HANDS IN THAT THE UNCONSCIONABLE ACTS OF PLAINTIFFS ARE DIRECTLY RELATED TO THE CLAIMS SUED UPON

The trial court's finding of unclean hands, if based upon substantial evidence, cannot be disturbed on appeal. Thayer v. Pacific Electric Ry. Co., 55 Cal. 2d 430, 11 Cal. Rptr. 560, 360 P.2d 56, (1961) cert. denied 82 S. Ct. 44, 368 U.S. 826, 7 L.Ed 2d 29. As will be demonstrated, the court's Statement of Decision, as well as the record, contains substantial evidence allowing the defense of unclean hands. The essential argument of Plaintiffs--that their "alleged misdeeds" have no nexus to the allegations of the complaint--is never directly addressed by Plaintiffs. Plaintiffs simply throw out a number of legal arguments, citing cases that have no application, failing to address the facts as found by the trial court and as supported by the evidence. Because the application of the clean hands doctrine is primarily a question of fact (Insurance Co. of North America, supra), the evidence in support of that finding must be addressed. Defendant is prepared to show substantial evidence in the record to support an unclean hands defense.

A. The Trial Court's Ruling Is Not Procedurally Erroneous.

Plaintiffs initially argue that the unclean hands defense was not procedurally available to Defendant because it had been stricken in pre-trial proceedings.

First, in none of those pre-trial proceedings was the defense stricken with prejudice to bar a later amendment (RT 312-313).

Second, a trial court has wide discretion in allowing amendment of any pleading, and its ruling with respect thereto will be upheld on appeal unless a manifest or

gross abuse of discretion is shown. Bedolla v. Logan and Frazer, 52 Cal. App. 3d 118, 125 Cal. Rptr. 59 (1975). Plaintiffs have failed to show any gross abuse of discretion.

Third, a trial court may sua sponte apply the clean hands doctrine on the grounds of public policy and as a means of protecting the court's integrity. Katz v. Karlsson, 84 Cal. App. 2d 469, 474-75, 191 P.2d 541 (1948).

Thus, Defendant was not procedurally barred from asserting the clean hands defense prior to trial.

B. Plaintiffs' Dirty Deeds Were Directed At Defendant.

Plaintiffs argue that unclean hands is not available where the alleged dirty deeds were directed at third parties. That may well be true, but this case deals with dirty deeds directed at Defendant. Therefore, this argument is not applicable.

C. This Case Does Not Concern Prior Unconnected Frauds And Misdeeds.

Plaintiffs make several arguments involving cases in which the conduct alleged to be unconscionable was found by the court to have no nexus to the acts complained of in the complaint.

Under argument heading number two (App. Brief, p. 71), Plaintiffs state that the unclean hands defense does not defeat injunctive relief simply because plaintiff seeks enforcement of a right that was acquired illegally. One case cited by Plaintiffs, Carman v. Athearn, 77 Cal. App. 2d 585 (1947) does not support that argument. In fact, Carman contravenes it. The Carman court noted that ". . . where a debtor has conveyed property to another for the purpose of defrauding his creditors, he cannot thereafter compel a reconveyance. In such a situation the doors of the equity court are closed to him." Id. at 598.

In Carman, however, the "misdeeds" involved prior fraudulent conduct of which the plaintiff debtor had "purged

himself" before entering into the transaction which formed the basis for the suit. Id. at 598. That is not the situation in the case at bar.

Under argument heading number three (App. Brief, p. 72), Plaintiffs argue that a defendant cannot invoke the unclean hands defense on the basis of Plaintiff's collateral wrongdoings against Defendant, citing German Mfg. Co. v. McClellan, 107 Cal. App. 532 (1930).

The key words are "collateral wrongdoing" in that the German case involved just that. Moreover, the "collateral wrongdoings" were not committed against the Defendant, but againt others in unrelated criminal proceedings. Again, the argument is inapplicable to the case at bar.

Further, the string of citations at page 73 of Plaintiffs' brief are factually inapposite.47/

Under argument heading number four (App. Brief, p. 74), Plaintiffs argue that unclean hands cannot be used where the purpose of Defendant's wrongdoing was to vindicate Plaintiff's wrongs against him, citing Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal. App.

47/ Plaintiffs use rather interesting interpretive language in parenthesis after each case citation. A reading of those cases, however, show they have no application. For example, in Lawter International, Inc. v. Carrol, 451 N.E. 2d 1338 (Ill.App. 1983), the misrepresentation to the defendant concerned a consulting agreement having no bearing on the issues of this case; in Gold Bond Stamp Co. v. E.F. MacDonald Stamp Co., 230 N.Y. S.2d 467 (App. Div. 1962), the misrepresentations were not made to the defendant but to others; in Patient Care Services, S.C. v. Segal, 337 N.E. 2d 471 (Ill. App. 1975), the plaintiff's "multiple breaches of agreement" with the defendant were totally unconnected to the subject matter of the complaint; in Agee v. Central Intelligence Agency, 500 F. Sup. 506 (D.D.C 1980), the "litany of wrongs" alleged by Agee against the C.I.A. had no connection with the causes of action. Further, there was no indication of what the "wrongs" were. The remaining cases cited by Plaintiffs are similarly inapplicable.

2d 675, 39 Cal. Rptr. 64 (1964). Again, prior allegedly fraudulent representations made by a plaintiff employer to picketing union members had nothing to do with the subject of the complaint for damages and equitable relief. Picketing union members had no right to assault anyone based upon the employer's prior false statements to union representatives.

The same reasoning applies to the argument made by Plaintiffs under heading number five (App. Brief., p. 75).

Defendant will demonstrate that the evidence in this case contains a number of unconscionable acts by Plaintiffs which relate directly to their causes of action for injunctive relief.

Lastly, under heading number six (App. Brief, p. 75) Plaintiffs argue that even where a plaintiff gains through illegal self-help that which he is entitled to through legal process, the unclean hands defense does not bar relief. The cases cited by Plaintiffs do not support this theory. In Poule v. Guste, 246 So. 2d. 353 (La. App. 1971), plaintiff did not destroy defendant's levee, but made two openings in it to allow for natural drainage. The court found this conduct sufficiently mild to reject unclean hands. In Maas v. Maas' Adm'r, 255 S.W. 2d 497 (Ky. App. 1953), the issue of the reconveyance of property to plaintiff was based upon facts which occurred long before plaintiff's unconscionable conduct charged as unclean hands.

D. Unconscionable Acts Of Plaintiffs Are Directly Related To The Claims Sued Upon.

1. Harassment by Private Investigators. After Plaintiffs filed suit on August 2, 1982, twenty-four hour open surveillance and harassment of Defendant accelerated on August 18, 1982 through the use of private investigators

hired by Plaintiffs.[48/] Plaintiffs used these investigators even after a temporary restraining order was issued on August 24, 1982 requiring all documents to be surrendered to the possession of the County Clerk (A-App. 57-60). The documents were, in fact, surrendered by Defendant's attorneys. Thus, there was no purpose to the surveillance except harassment in that it continued well into September, 1982 (RT 1725-1726).

Plaintiffs argue that it is unclear whether the private investigators harassed Defendant or whether Defendant harassed the investigators. It is clear from the court's ruling on unclean hands that the court was persuaded by the testimony of Defendant and by the documentary evidence that it was the Defendant who, in fact, was the victim of intense harassment.[49/]

In addition to his direct testimony during trial (RT 1725-1734; 1774-1776), the defense also introduced a daily log of events kept by Defendant at the time of the surveillance (Exhibit GGG). From this evidence, the trial court found that Defendant was the subject of harassment which included being followed and surveilled by private investigators who admitted employment by Plaintiff (RT. 3987); being assaulted by one of these individuals; being struck bodily by a car driven by one of these individuals; having two attempts made to involve Defendant in

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48/ See Plaintiffs' Exhibit 21 which are a series of invoices from the investigative service showing surveillance from May through September, 1982. This surveillance included Utah, where Mr. Garrison resided. Plaintiffs introduced these invoices as evidence of damages they incurred for payment of private investigators.

49/ The trial court noted in granting an amendment of the answer to include unclean hands, that harassment, threats or intimidation used to retrieve the documents would go to the issue of unclean hands (RT 310). Further, in the Appendix to the Memorandum of Decision, the trial court described some of the harassment undergone by Defendant at the hands of the private investigators (A-App. 276-277).

a freeway automobile accident; and having said individuals come onto Defendant's property, spy in his windows, create disturbances and upset his neighbors.

All of this was done for the direct purpose, according to the head of the investigative service, of finding out whether Defendant had the subject documents (RT 3987). Although Plaintiffs claim there was unrebutted testimony that the investigators were to have no physical contact with Defendant, the head of the investigative service admitted on cross-examination that he had no personal knowledge of what his investigators did while following Defendant (RT 3997). Thus, it is the testimony of Defendant and his wife who was also present and subject to the harassment which stands unrebutted.

Because Plaintiffs' suit specificially involves the subject documents, the harassment of Defendant to discover whether he had any of the documents in his possession forms a direct, intimate nexus to the litigation. According to the California Supreme Court in De Garmo v. Goldman, 19 Cal. 2d 755, 123 P.2d 1 (1942), any "unconscientious conduct" upon the plaintiff's part "which is connected with the controversy will repel him from the forum whose very foundation is good conscience." Id. at 123 P.2d 6.50/

The conduct undertaken by Plaintiffs against Defendant through the private investigators was clearly unconscientious. The actions of the investigators comported with the policy of Plaintiffs to treat enemies of Scientology as "fair game." Defendant was treated that way by having his privacy invaded, being assaulted, battered and generally harassed. This action was taken against him even though he did not have the documents, and the court had already issued an order for delivery of the documents by Defendant's attorneys to the court.

50/ Thus, Plaintiffs' contention that the "threshold requirement" for unclean hands is "willful misconduct" (App. Brief, p. 76) is not accurate, although Plaintiffs conduct could be characterized as such.

2. Issuance of Two Suppressive Person Declares on Defendant. As previously discussed (See Statement of Facts, supra), two Suppressive Person Declares were issued against Defendant making him the subject of "fair game" to Scientologists and the Scientology Organization.

The second Declare issued on April 22, 1982 charged him, among other things, with promulgating false information about the Church, its Founder and members "through the guise of 'documentation'", and further claimed that "altered documents" had been found in his area (Exh. M). This cleared the way for Plaintiffs to use whatever intimidation tactics they desired against Defendant to silence him, including the confiscation of his photographs, the threats that he should hire an attorney, the contact of his family and friends by intelligence agents and the use of private investigators to surveil him.

Although Defendant had honestly attempted to persuade the Organization to remedy the falsehoods about L. Ron Hubbard he had discovered through his research, he was met only with attack, intimidation through a threatened security check, issuance of declares, confiscation of his property and surveillance and harassment by private investigators.

In the case of Hubbard v. Vosper, 1 All. E.R. 1023 (1972), the Court refused to grant equitable relief in the form of injunction to the Church of Scientology of California based upon the doctrine of unclean hands. The Court cited extensively to the Fair Game Doctrine, the practice of labeling individuals suppressive persons, and the practice of attacking individuals who are in any way critical of the Scientology Organization. The Court emphasized that the dangers of the cult should be exposed. Id. at 99-101.

The Hubbard v. Vosper case bears a striking similarity to the case at bar. In Hubbard, plaintiffs Hubbard and the Church of Scientology sought an injunction to

restrain defendant Vosper from publishing a highly critical book about Scientology which contained excerpts from Hubbard's books and writings. Plaintiffs sued defendant Vosper for infringement of copyright and breach of confidence.

Like Defendant Armstrong, defendant Vosper had been a member of the Church of Scientology for many years (14) and had been required to "sign an undertaking (a) to use the knowledge acquired on the course (Advanced and Confidential Scientology Course) for Scientology purposes only, and (b) to refrain from divulging information received by those not entitled to receive it." Hubbard at 92 (material in parentheses added).

Like Armstrong, defendant Vosper became disillusioned with Scientology and left the organization.

Like Defendant Armstrong, defendant Vosper was declared a "suppressive person" in a condition of "enemy," with no right to "self, possessions or position," and at the mercy of the Scientologists who "could take any action against him with impunity." Id. at 92.

The Court denied plaintiffs' injunction and stated that defendant Vosper had a defense of public interest in exposing the dangers of Scientology (see opinion of Lord Denning, p. 96).

The Court ended by stating that Hubbard and the Church of Scientology had been "protecting their secrets by deplorable means" and that they came before the Court with unclean hands in asking the Court to protect their secrets through the equitable remedy of injunction.

What happened in the case at bar is also that Plaintiffs wished to protect their secret as contained in the documents--that L. Ron Hubbard is a fraud. When Defendant discovered the same and went to the Organization to try to correct the falsehoods, he was attacked. Although his

actions were taken in good faith, Plaintiffs acted with anything but good faith toward Defendant. Their operations against Defendant were disgraceful. First, they attempted to intimidate him through interrogation and a security check. When this was unsuccessful, they declared him to be an enemy of Scientology and held him subject to the Fair Game Doctrine. Defendant knew from his experience and examination of the documents what the Fair Game Doctrine entailed. The mere invocation of the doctrine by Plaintiffs constitutes an unconscionable act of intimidation. By using the Fair Game Doctrine, Plaintiffs hoped they would intimidate Defendant into giving up his attempts to have the truth about L. Ron Hubbard known.

Had Plaintiffs told the truth about L. Ron Hubbard's background, his involvement in the Church of Scientology, and his control of Scientology, the documents which are at the core of this case, would have no significance and there would have been no controversy before the trial court. The case arose only because of Plaintiffs' desperate attempts to continue to conceal the truth about Hubbard and to hide their fraud.

In De Garmo v. Goldman, supra, the court makes it clear that even a suggestion of a lack of good faith on the part of the plaintiff is sufficient to apply the clean hands doctrine. The cases, however, make it exceptionally clear that fraud is one of the types of conduct which will lead to the imposition of the doctrine. As Judge McComb concisely put it in Rosenfeld v. Zimmer, 116 Cal. App. 2d 719, 254 P.2d 137, (1953), "a court of equity will not assist a party to a fraudulent scheme to secure the objective of his plan." In fact, equity's distaste for aiding proponents of a fraud goes so far it will not only refuse relief to proponents of an accomplished fraud, but even to those who did not actually succeed in defrauding others.

> "Equity, in administering its remedies, regards not alone the

> accomplished fact, but also the intent and purpose of the act . . . the unclean hands is equally applicable to cases of intent to defraud as to those in which the intent ripened into accomplishment." Belling v. Croter, 57 Cal. App. 2d 296, 134 P.2d 532, 536 (1943). See also, Rosenfeld v. Zimmer, supra; Samuelson v. Ingraham, 272 Cal. App. 2d 804, 77 Cal. Rptr. 750 (1969).

3. The Taking of Defendant's Photographs.

As demonstrated through the Statement of Facts, supra, because Defendant was "fair game" to Plaintiffs after the issuance of the Suppressive Person Declares, it became possible for Plaintiffs to lie to, cheat and deprive Defendant of property. The photograph incident, in which photographs were unilaterally "confiscated" by Plaintiffs and allegedly destroyed, arose because Plaintiffs believed Defendant had converted the archive documents to his own use. Defendant was told that the photographs had been given to Plaintiffs' attorneys, although Terri Gamboa testified that she had thrown them away. Thus, not only had Defendant been lied to and cheated, but he had been deprived of property. The use of the fair game doctrine against Defendant because of the Plaintiffs' belief that he had converted documents (when, in fact, Defendant had no documents at the time and had converted nothing) was insidious, deplorable conduct.

4. General Harassment of Defendant, His Family and Friends.

In addition to the surveillance and harassment which took place after Plaintiff Church had filed its complaint against Defendant, Defendant was also surveilled as early as May, 1982. Plaintiffs claim that this surveillance was carried out to determine whether Defendant had any documents in his possession, and is typical of Plaintiffs' use of "fair game" to intimidate individuals into submission. In the same vein, Plaintiffs also had a Guardian's Office

agent contact Defendant's family and friends, as more fully set forth in the Statement of Facts, supra.

5. Witness Tampering.

As evidence of the extent to which Plaintiffs will employ unconscionable conduct in litigation, Plaintiffs attempted to thwart defense witness Howard "Homer" Schomer from testifying. Pursuant to a document entitled "Homer Schomer Salvage Mission," two friends of Mr. Schomer, who were still Scientologists, were sent to his home to "prevent Homer from going over to the enemy camp . . ." (Exh. HHHH; RT 4541-4542). The document, Exh. HHHH, states the following as "Mission Information":

> "Per the recent reports from contacts made with Homer he is likely to go over to the enemy camp. He has already been contacted in regards to being a witness in the Armstrong case. He is thinking of turning against us completely. See debrief on phonecall for full data."

This "mission" was issued May 28, 1984, during the trial and prior to Mr. Schomer's testimony. It clearly shows that Plaintiffs considered Defendant an "enemy" and that they would do what was necessary to "prevent" Mr. Schomer from entering the "enemy camp." (See also, court's comments at A-App. 277). Such unconscionable conduct is directly related to the controversy before the trial court and shows the total lack of good conscience in which Plaintiffs conducted the litigation.

VII

THE TRIAL COURT'S UNSEALING ORDER DOES NOT INFRINGE UPON PLAINTIFFS' RIGHT TO PRIVACY

A. Plaintiffs Agreed To And Advocated A Procedure For Discovery Of The Sealed Documents.

Following delivery of the documents to the County Clerk by Defendant's attorneys, a preliminary injunction was issued on October 4, 1982 (A-App. 61). The court refused to return possession of the documents to Plaintiff Church, and instead placed the documents under seal with inspection privileges allowed to the parties. The preliminary injunction further provided that third parties in litigation could obtain discovery of the documents upon a showing of relevancy (A-App. 62-63).

Plaintiffs never sought extraordinary review of the order allowing third party discovery. Plaintiffs sought only a clarification of the discovery portion of the preliminary injunction, providing for a set procedure to be followed by third party litigants. An order allowing this discovery was drafted by attorneys for Plaintiff Church and signed December 23, 1982 (Respondent's Appendix 1).[51/] The order provided for discovery of the very documents over which Plaintiffs now make strenuous privacy claims.

Moreover, at trial, Plaintiffs introduced 62 of the previously sealed exhibits into evidence (RT 2392-2429).

B. The Law Favors Public Disclosure Of Judicial Proceedings.

Plaintiffs cite at length from the case of United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980), which involved the seizure of approximately 50,000 documents from two Los Angeles sites of Scientology's intelligence bureaus by F.B.I. agents in 1977 in connection with the criminal prosecution of eleven officers of the Church of Scientology.[52/] The rationale of the Hubbard opinion is inapposite to this case in that Hubbard involved a question of public access to documents following a trial in which the

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51/ It is interesting to note that Plaintiffs did not include this order in their Appendix.

52/ Including Plaintiff Mary Sue Hubbard, who was convicted of conspiracy to obstruct justice (RT 858-859).

documents were introduced by the defendants solely to show the overbreadth of a search warrant. The Hubbard court considered this the "single most important element" of its decision to maintain a seal on the documents. Id. at 321.

Plaintiffs quote from the case out of context. Upon a reading of the full opinion, it is clear that the Court of Appeal in Hubbard opened avenues in which public access to the documents would be allowed on a showing of some particularized interest sufficient to overcome a privacy interest. Some of those interests included the following:

A. That the documents were already made public through other means. Id. at 322.

B. That the documents evidenced crimes, which if not released, would not allow the public to take necessary steps to insure protection. Id. at 323.

C. That the remedies of "grievously injured and unknowing victims would be jeopardized if the documents ever entered the public domain." Id. at 323.

With these interests in mind, the Court of Appeal remanded to the trial court and requested more particularized findings as to the interests of the public in disclosure of the documents.

On remand, the trial judge simply reaffirmed his original order unsealing the documents and then recused himself. The judge who was thereafter assigned to the case indicated he was in no position to supplement the original judge's rationale and concluded that the documents would remain under seal until their evidentiary utility was exhausted. Id. at 332-33; see also, Id. at 302 fn. 21.

In the case at bar, the trial court spent five weeks making determinations, based upon the evidence presented, as to which of the previously sealed exhibits were relevant and material to Defendant's defenses. The trial court in the case at bar did what the trial court in Hubbard failed to do. The trial court's Memorandum of Decision makes

particularized findings as to the interests of Defendant and third parties to protect themselves from the "massive fraud" (A-App. 271) perpetrated by Plaintiffs.[53/]

The findings made by the trial court in this case fit squarely within the interests recognized by the Hubbard court at page 323 of the opinion as cited above. The Hubbard court recognized that privacy interests could be overcome in situations where documents contain evidence of crimes, which if suppressed, would jeopardize injured and unknowing victims from taking necessary steps to seek remedy. If the exhibits in the present case were sealed, the Court would be aiding in the suppression of evidence relating to a "massive fraud."

Further, the Hubbard court also recognized that a privacy interest could be overcome where documents had already been made public through other means. Id. at 322. Testimony at the trial in this case and other evidence in the record show that certain documents and groups of documents had already been made public.

It should be noted that prior to the decision in the Hubbard opinion cited above,there was a nine-month period in which the documents seized by the FBI were unsealed and made available for public inspection in the United States District Court in Washington, D.C. As a result of the unsealing, the California Church (an intervenor in the criminal action) sought a court order to mandate the sealing of the copies of documents made by numerous individuals, newspapers and government agencies during the period of the unsealing. In United States v. Hubbard, 686 F.2d 955 (D.C. Cir. 1982) the Court of Appeal addressed the issue and gave full reign to courts in other jurisdictions to make decisions regarding the disclosure and use of the sealed materials obtained by various members of the public during the period

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53/ Additionally, the trial court heard extensive argument regarding unsealing and admission of the sealed documents into evidence before making a ruling (RT 16-133); See RT-125-133 for the court's ruling.

of unsealing. Absent a sealing order obtained in the appropriate jurisdiction, the Court of Appeal stated that the documents obtained during the period of unsealing "may be freely disseminated." Id. at 957.

From the testimony at the trial of this action, from the contents of the exhibits themselves, and from the manner in which Plaintiffs attacked and harassed Armstrong when he sought the help of Plaintiffs to correct the extensive falsehoods about L. Ron Hubbard and the Church of Scientology, it is absolutely clear why Plaintiffs seek to have this Court impose a seal. It is secrecy, not privacy, which Plaintiffs wish to protect.

> "Judicial proceedings are not secret in our society. Indeed, the judiciary scrupulously requires that all participants in a judicial proceeding be given equal access to the court and that . . . the proceedings be open to the public, with severely limited exceptions." United States v. Hubbard, 650 F.2d at 329.

And:

> "The requirement for public disclosure of the evidentiary record in a court proceeding which results in a judicial ruling naturally flows from the constitutional requirement that the trial be public . . . A judicial proceeding cannot be said to be public if the public is denied access to the evidence admitted as relevant to the issues before the court. It is important to public disclosure of judicial proceedings that the public be able to read written evidence in the record as it is that they be able to hear oral testimony."
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> Id. at 330 [Emphasis in original].

If the "presumption of openness inheres in the very nature of a criminal trial under our system of justice," then

it should certainly inhere in a civil trial wherein frauds upon the public can be aired. Richmond Newspapers, Inc. v. Virginia 448 U.S. 555 (1980). In the words of one Court, "Sunshine is the best disinfectant." United States v. Hubbard, 650 F.2d at 330.

C. Plaintiffs Failed To Show How The Subject Documents Are "Enshrined Within The Highest Protections Of The State And Federal Constitutions."

Plaintiffs continuously assert that the subject documents are highly personal and private in nature, without stating what they actually are. At trial, Defendant testified that there was only one letter out of all the letters under seal which he believed was personal (RT 1717). The bulk of the documents included L. Ron Hubbard's naval records (Exhs. 500 BB-CCCC); documents dealing with Black Magic (Exhs. 500 JJJJ and KKKK); documents on L. Ron Hubbard's divorce proceedings (Exhs. 500 MMMM and NNNN); writings and letters regarding the running of the Scientology Organization and regarding legal matters (Exhs. 500 VVVV - YYYY; AAAA - BBBBB; FFFFF - MMMMM; SSSSS - BBBBBB); Scientology policies written by L. Ron Hubbard (Exhs. 500 EEEEEE - IIIIII); handwritten documents regarding the Fair Game Doctrine (Exhs. 500 JJJJJJ - QQQQQQ); and a binder including fair game against Defendant's attorney, Michael Flynn (Exh. 500 SSSSSS) (See Exh. 15, Defendant's List of Exhibits from Documents Under Seal for a complete listing; See also Defendant's testimony regarding each of said documents at RT 1805-2070).[54/]

The foregoing documents could not be considered trade secrets, literary property or highly personal documents. Thus, cases cited by Plaintiffs dealing with

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54/ The trial court used the prefix number "500" to designate the exhibit as one coming from the documents under seal. Any exhibit without the "500" prefix was not previously under seal.

those types of documentation have no application here. The trial court reviewed each document as it was marked as an exhibit, and where the court found a privilege to exist or, as in one case, material personal to L. Ron Hubbard (Exhs. 500 DDDD - GGGG),[55/] the documents were maintained under seal (A-App. 252, fn. 1). The remainder of the exhibits were not "enshrined" with any particular privacy interest and were unsealed by the trial court.

VIII

NO MISCARRIAGE OF JUSTICE RESULTED FROM THE LIMITED ADMISSION OF TESTIMONY AND DOCUMENTARY EVIDENCE TO SHOW DEFENDANT'S STATE OF MIND

As currently stated by Plaintiffs, the trial court admitted the testimony and documentary evidence for the limited purpose of showing Defendant's state of mind to support his privilege and justification defenses. The court specifically stated on two separate occasions, as set forth in Appellants' Brief at pp. 90-91, that it would not consider the evidence offered for its truth or falsity. The trial court repeated, almost after every objection to this evidence, that it was only accepted for Defendant's state of mind. The law is well settled that when a matter is tried to the court, and the court states that it is not considering the particular hearsay, irrelevant or incompetent evidence in arriving at its decision, there is no prejudicial error. Eldridge v. Scott Lumber Co., 187 Cal. App. 2d 457, 9 Cal. Rptr. 623 (1960). Even where the trial court does not so

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55/ The court did, however, allow limited reading from these exhibits (RT 1916-1929).

state, "it would be assumed that the court in reaching these conclusions disregarded any incompetent testimony which might have found its way into the record." Id., at 461. See also, Goto v. Goto, 187 Cal. App. 2d 594, 10 Cal. Rptr. 14 (1960) (where trial court stated it did not rely on privileged documentary evidence erroneously admitted, there was no error).

In the present case, the trial court repeatedly stated after objections were made by Plaintiffs' counsel, that the evidence would be admitted solely to show Defendant's state of mind. Plaintiffs complain that the trial court's decision was nonetheless "affected" by the evidence. They quote from the court's Statement of Decision wherein the court makes certain observations about L. Ron Hubbard, both critical and complimentary (App. Brief, p. 96-97). At best, these observations can be considered dicta, in that the court made a number of other factual findings which directly support its conclusions of law.[56/]

56/ See Appendix to court's Statement of Decision (A-App. 263). Further, with respect to its conclusion that the invasion of privacy was not unreasonable, the trial court found the invasion "slight" and the justification for the invasion manifest. With respect to the breach of fiduciary duty claim; the court found Defendant's actions privileged pursuant to a superior interest in the protection of himself and his family. With respect to the conversion claim, the court also found Defendant's actions privileged in his attempts to protect himself from the direct attacks upon him by being declared suppressive and an enemy subject to fair game, by having his possessions taken and by being threatened with litigation. Regarding these three causes of action and the defenses thereto, the Court's findings concentrated on what directly happened to Defendant, his state of mind and his conduct as a result thereof (A-App. 255). The court never considered the truth or falsity of Defendant's testimony regarding the contents of the sealed documents admitted into evidence in relation to his defenses. The Court simply found that Defendant felt his life was threatened because "of what he knew about the life of LRH . . ." (A-App. 255). Again, the evidence went only to Defendant's state of mind.

There is thus no merit to Plaintiffs' contention that the Court considered the documentary evidence for its truth.[57/] The court did not care whether Mr. Hubbard was in fact crippled and blinded at the end of World War II, or that he was or was not a war hero. The court's concern lay with Defendant's perception, after being declared a thief and enemy of Plaintiffs, that the documents supported Defendant's contention that he was in fear and needed the documents to defend himself. The court concentrated on the reasonableness of Defendant's conduct. In determining reasonableness, the court had to learn about the contents of the documents admitted as evidence. The contents were relevant to show why Defendant perceived these documents to be necessary in the protection of himself and his family. The court had to examine whether the documents indeed showed what Defendant believed they showed in order to arrive at the conclusion that the Defendant's acts were reasonable. As the trial court stated at the outset of the introduction of the subject documents:

> "I think before we do that (introduce the documents), we probably ought to determine what we are doing with this evidence in the sense that, as I understand, the defense is that there is basically, there is a privilege which relates to the documents that were submitted to you or to Contos & Bunch that had to do with his lawsuit or his fear of being sued.
>
> Now it seems to me if that is the thrust of this evidence, the thrust is then why did he take certain documents? How did it relate to his belief that this would be necessary

57/ Plaintiffs also contend that this evidence was considered with respect to the unclean hands defense. As demonstrated, supra, as to that defense, the Court was concerned with the activity of Plaintiffs' private investigators, etc. and not with testimony regarding Mr. Hubbard.

> to defend himself in this lawsuit with the Scientology people as distinguished from whether something is true or not true in the abstract, if you follow what I am saying." (RT 1799).

And in response to defense counsel's statement as to the introduction of the documents:

> "MR. FLYNN: Your Honor, I submit that what the defense feels should be done is that the exhibits that disprove the representations about L. Ron Hubbard that became the entire focus for Mr. Armstrong's difficulties with the organization and, really, the reason for this lawsuit, we believe the basic reason this case is in court is because this witness found out that the representations made about this man over a period of 30 years were false.
> THE COURT: It seems to me that all that is fine. But what we are dealing with is what his explanation is for taking certain documents and submitting them to you.
>
> It seems more logical to have him look at a document, an exhibit, a list; this is something I took; this is why I took it; this is how it relates to why I wanted you to have it rather than, you know, I don't -- we are not here to in the abstract prove the truth or falsity of certain things. We are here to determine if he took them, why he took them; whether there is legal breach as distinguished from other aspects of whether he had consent to have them in the first place or whether there is a breach of any duty or other reasons." (RT 1805.)

Thus, although the court allowed the testimony, it was clearly limited.[58/]

Plaintiffs also object to the introduction of "vast amounts of hearsay testimony" from Defendant regarding the history of his relationship with Scientology. This testimony was not offered for its truth, but for the limited purpose of showing Defendant's state of mind. The history of Defendant's relationship with Scientology is highly relevant in the context of his privilege and justification defenses because it shaped, for the court, the context in which Defendant found himself at the time he sent the documents to his attorneys. It allowed the court to fully understand the reasonableness of Defendant's conduct. It provided a mental or emotional picture of the years of fear and intimidation suffered by Defendant, all of which impacted his state of mind in 1982.

As discussed under the section regarding the conversion count, supra, such evidence is relevant to show the actor's "state of mind and nerves, and the threats, past conduct, and reputation of his assailant." It is "important

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58/ At footnote 63 of Appellants' Brief, they set forth a number of citations to "hearsay evidence" in the form of documents. It should be noted that certain of those documents were not admitted (E.g. R.T. 1964 (Exhs. 500 DDDD-IIII; 500 OOOO were specifically sealed; R.T. 1961-1967; 4613); (E.g. R.T. 1983; 4623-4624). One document was not a sealed document, was not objected to on hearsay grounds and was also authenticated by Plaintiff Mary Sue Hubbard (R.T. 2046; Exh. AAA; R.T. 3730-3731; 2792-2793). One document was conceded to be relevant by Plaintiffs' counsel (R.T. 2058; 4673).

and admissible on the issue of what was reasonable." Prosser, Law of Torts, page 125 (5th Ed. 1984).59/

59/ Plaintiffs cite to a number of instances of such "hearsay evidence" at footnote 65 of their Brief. Regarding Mr. Hubbard's direction that Defendant be "locked up," the court explained in its reasoning for allowing this evidence in (R.T. 1459). Regarding prevention of service of court papers on Mr. Hubbard, Defendant testified that he knew that was the case (R.T. 1535). Further, Defendant testified elsewhere that as a guard at the La Quinta property it was his duty to prevent service of process, that he was drilled on this procedure at La Quinta, the ship Apollo and Gilman Hot Springs. With respect to intelligence activities against Mr. Hubbard's son, this evidence did not come in for its truth, but rather, during Defendant's testimony about the circumstances of a letter he sent to Cirrus Slevin (Exh. II) before he left Scientology in which his "intentions in airing the inaccuracies, falsehoods, and frauds regarding Hubbard were done in good faith." (A-App. 271) The court considered this letter for Defendant's state of mind, not for the accuracy or truth of its contents. (R.T. 1665) Regarding the assassination plot by the Church against a woman, Plaintiff's counsel acknowledged that the evidence came in for state of mind (R.T. 1679). Further, there is no indication that the court even relied upon or was affected by this brief statement in view of the massive evidence regarding Defendant's state of mind already on the record. Adams v. Young, 255 Cal. App. 2d 145, 157, 62 Cal. Rptr. 877 (1967) (no error where hearsay evidence admitted for state of mind where other state of mind evidence already in record). Regarding the Church funnelling money to Mr. Hubbard (R.T. 1779-1782), this evidence was within the personal knowledge of Defendant (R.T. 1781-1782), but it was not used for its truth. The evidence came in in the context of Defendant's testimony regarding his refusal to sign a release document before leaving Scientology which claimed that the Hubbards received no money from the Church (Exh. MM; R.T. 1779). The court allowed the testimony for state of mind (R.T. 1780). Regarding the Church's covert intelligence operations, and the use of LSD in people's toothpaste (R.T. 2063; 2074), this evidence was used for state of mind and was highly relevant for that purpose. This evidence allowed the court to determine whether Defendant's conduct after he left Scientology, and was threatened, was reasonable.

The third category of evidence which Plaintiffs contend was prejudicial and improperly considered by the trial court concerned the testimony of defense witnesses. Their testimony, however, corroborated the testimony of Defendant regarding certain practices of Plaintiffs which affected Defendant's state of mind and allowed the court to determine whether Defendant acted reasonably in 1982 when he sent the subject documents to his attorneys. Erroneously admitted evidence is harmless where it is cumulative or corroborative of other evidence. City of Los Angeles v. Howard, 244 Cal. App. 2d 538, 546, 53 Cal. Rptr. 274 (1966).

Although Defendant does not agree that the admission of the testimony of defense witnesses was erroneous, the law clearly provides that where it is corroborative, it is harmless.

Defendant had knowledge of all of those matters regarding which defense witnesses testified. This can be easily seen from a review of Defendant's testimony. Their testimony strengthened and corroborated the evidence he presented regarding his state of mind (E.g. the Fair Game Doctrine, harassment, the culling of information from pre-clear files, the use of security checks, etc.).60/

Lastly, is Plaintiff's claim that the trial court "repeatedly interrupted and even mocked the Plaintiff's witnesses." (App. Brief, p. 94.) A review of Plaintiff's

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60/ At footnote 66 of their Brief, Plaintiffs cite to a number of "examples" of "irrelevant and hearsay testimony of defense witnesses." With respect to Laurel Sullivan's testimony regarding harassment of her by the Church (R.T. 3318-3340), that testimony was elicited by Plaintiff's counsel on cross-examination. Regarding Ms. Sullivan's testimony that Mr. Hubbard received money from foreign Scientologists (R.T. 3010-3014), not only was this testimony cumulative and corroborative of other testimony, but the court determined it was not hearsay (R.T. 3014). Nancy Dincalci's testimony regarding the culling of pre-clear files to find "crimes" was cumulative and corroborative of Defendant's testimony and the testimony of other witnesses that such "crimes" were reduced to writing and were made to be signed by

citations to the record do not reveal such conduct by the trial court.[61/]

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the person attempting to leave Scientology, and his knowledge of what the Organization might do with his alleged "crimes." As it turned out, the Suppressive Person Declare issued on April 22, 1985 charged him with numerous "crimes and high crimes." Further, this testimony corroborated testimony regarding the use of G.O. 121669 (Exh. AAA), a document admittedly authored by Plaintiff Mary Sue Hubbard (R.T. 2792; 3730-3731) which provided direction for the culling of pre-clear files. Edward Walter's testimony concerned the use and alleged cancellation of the Fair Game Doctrine (R.T. 3579-3590). There was extensive testimony regarding Defendant's fear that he was "fair game" to Plaintiffs after being declared a suppressive person. Since Plaintiffs' claimed that the Fair Game Doctrine had been cancelled, Mr. Walter's testimony was relevant to show that (1) it had not been cancelled, and (2) that Defendant's state of mind in believing he was fair game was entirely reasonable. In fact, the court noted the latter in ruling on Mr. Walter's testimony (R.T. 3579). Howard Schomer's testimony regarding the security checks he underwent was relevant and corroborative of Defendant's testimony in relation to his fear of security checks and what such a procedure meant to him (R.T. 4498 ff.). Again, it allowed the court to look at the reasonableness of Defendant's conduct and state of mind with respect to his fear of attack by Plaintiffs. That Mr. Schomer was the subject of a "mission" to prevent him from coming into the "enemy camp" and testifying for the Defendant is highly relevant evidence of Plaintiffs' unclean hands in the conduct of the litigation (Exhs. GGGG, HHHH, IIII) (See also, A-App. 277 for trial court's finding with respect to this conduct).

61/ Plaintiffs have used the same citations in attempting to obtain disqualification of the trial court without success. See discussion, infra, section IX.

IX

IF A RETRIAL IS REQUIRED, IT SHOULD BE CONDUCTED BY THE SAME TRIAL JUDGE

Plaintiffs contend that the trial judge in this case demonstrated a fixed opinion about the facts and expressed a belief that the Plaintiffs' witnesses testified falsely, citing Keating v. Superior Court, 45 Cal. 2d 440, 289 P.2d 209 (1955). Plaintiffs thus request that should the matter be retried, a new trial judge be appointed.

The Keating case, however, involved a trial judge who stated, on the record, that the defendant had willfully testified falsely, and that he had no confidence whatsoever in defendant's integrity and veracity. The key is that the trial judge must find that there was perjured testimony to be prevented from retrying a case.

There is nothing in the Memorandum of Decision in this case, or on the record, where the trial court states that any of the Plaintiffs' witnesses testified falsely. The most the trial court did was state his conclusions as to the "accuracy, partiality and bias of the witnesses." Blackwell v. Blackwell, 190 Cal. App. 2d 520, 12 Cal. Rptr. 201 (1961).

In the Blackwell case, the Court of Appeal affirmed a decision of the lower court denying a motion to disqualify a juvenile court judge. The case involved a custody battle in which the court heard the testimony of the parties and many witnesses:

> "The judge orally reviewed the evidence in detail, stating his conclusions as to the accuracy, partiality and bias of the many witnesses who had been called. He refused to accept as accurate much of the testimony of husband and his witnesses and dismissed the proceeding." Id. at 522.

The Court of appeal found nothing in the record that approached the opinion expressed in the Keating case.

Id. at 525. Thus, opinions as to accuracy, partiality and bias of witnesses is not sufficient for disqualification on retrial. The court must find perjured testimony, which the trial judge in this case did not do.

Lastly, Plaintiffs attempted to obtain disqualification of the trial judge in this case by way of motion, which motion was denied. A petition for writ of prohibition/mandate to the Court of Appeal, Second Appellate District, Division Five, followed (Case No. B008623). Said petition was denied on February 15, 1985. A petition for hearing to the California Supreme Court was then filed (Case No. B010153) and denied on March 14, 1985.

X

CONCLUSION

Based upon the foregoing and the record before this court, Defendant respectfully requests that the judgment of the trial court be affirmed and that the sealing order presently in effect with respect to the exhibits introduced at trial be vacated.

DATED: December ____, 1985

Respectfully submitted,

CONTOS & BUNCH

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3:24:2

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____ a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19___, at _____ California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT

(other than summons and complaint)

Received copy of document described as _____

on _____ 19___.

_____ _____

Type or Print Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of LOS ANGELES, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 5855 Topanga Canyon Blvd., Ste. 400, Woodland Hills CA 91367

On Jan. 27 19 86, I served the foregoing document described as RESPONDENT'S BRIEF

on the parties

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

see attached list

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Woodland Hills, California.

Executed on Jan. '27, 19 86, at Woodland Hills, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on _____, 19___, at _____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

PAMELA J. RUCKER

Type or Print Name

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